Supreme Court, U.S.
FILED
07-640 NOV 13 2007
OFFICE OF THE CLERK

No. ____

In The
Supreme Court of the United States

PHILIP BERQUIST,
Petitioner,

v.

WASHINGTON MUTUAL BANK,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JOSEPH Y. AHMAD
Counsel of Record
AHMAD, ZAVITSANOS & ANAIPAKOS, P.C.
3460 ONE HOUSTON CENTER
1221 MCKINNEY STREET
HOUSTON, TX 77010
(713) 655-1101
(713) 655-0062 FAX
Counsel for Petitioner

November 12, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS FOR REVIEW

1. In a case involving a reduction in force, what is the fourth prong of a *prima face* case of age discrimination?

2. May a court require two similarly situated employees to be "nearly identical" in order for their disparate treatment to support a *prima facie* case of age discrimination?

3. What is the test for determining whether ageist comments support an inference of age discrimination at the *prima facie* case and at the ultimate determination of pretext?

4. Whether the United States Court of Appeals for the Fifth Circuit has varied far from the other circuit courts of appeal by suggesting that an employer's otherwise discriminatory conduct may be excused because the employee refused to sign a release.

5. Whether the United States Court of Appeals for the Fifth Circuit ignored the plaintiff's evidence in support of his *prima facie* case and failed to draw all inferences in favor of Petitioner when considering whether petitioner had ultimately proved discrimination.

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Supreme Court Rule 14(b), the undersigned counsel of record certifies that the following listed persons or entities have an interest in the outcome of this case:

PHILIP BERQUIST, Plaintiff - Petitioner

Joseph Y. Ahmad, Ahmad, Zavitsanos, & Anaipakos, P.C. , Attorney for Plaintiff - Petitioner PHILIP BERQUIST

WASHINGTON MUTUAL BANK, Defendant - Respondent

Washington Mutual Bank is owned by Washington Mutual, Inc., a publicly traded company.

Jeffrey C. Londa, Robert L. Ivey, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Attorneys for Defendant - Respondent WASHINGTON MUTUAL BANK

TABLE OF CONTENTS

QUESTIONS FOR REVIEW i

CERTIFICATE OF INTERESTED PARTIES ii

TABLE OF AUTHORITIES vi

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS OF THE CASE 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

A. Course of the Proceedings and Disposition in the Courts Below. 2

B. Statement of Facts 3

SUMMARY OF ARGUMENT 8

ARGUMENT 10

A. The Court of Appeals Imposed Unduly Burdensome Hurdles to Establishing the Fourth Element of the *Prima Facie* Case. . 10

1. By literally requiring that Berquist show "replacement" or else provide ultimate proof of discrimination, the court of appeals departed from the

authorities of other courts of appeal. 13

2. The Courts of Appeals employ a wide array of "fourth prongs" of the *prima facie* case in RIF cases, and their differences are material. 15

3. The Fifth Circuit's standard erroneously requires the plaintiff, as part of the *prima facie* case, to rebut the employer's nondiscriminatory rationale, in conflict with other circuit courts. 19

B. The Court of Appeals improperly required Berquist to be "nearly identical" to younger employees in order to be similarly situated to them, and based on this faulty standard, determined that Berquist did not establish a *prima facie* case. 22

C. In deciding that Martinez's ageist comments did not support Berquist's *prima facie* case, the Court of Appeals improperly weighed and assessed their credibility. 28

D. The Court of Appeals' opinion appears to equate "following procedures" with "signing a release." 33

E. The Court of Appeals ignored all of Berquist's evidence in support of his *prima facie* case and held that he had "no evidence" to rebut the Bank's legitimate,

nondiscriminatory reason for his discharge. 34

1. The court below ignored Berquist's evidence, including that which supported his *prima facie* case..... 34

2. Berquist has substantial evidence of pretext and discrimination, more than sufficient to defeat summary judgment..... 35

CONCLUSION 37

APPENDIX:

Appendix A: Fifth Circuit decision (Aug. 31, 2007) 1a

Appendix B: District Court decision (Sept. 7, 2005) 27a

Appendix C: Fifth Circuit denial of rehearing (Aug. 13, 2007) 36a

Appendix D: Fifth Circuit judgment (July 12, 2007) 38a

Appendix E: Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ..... 40a

TABLE OF AUTHORITIES

Cases

Abdu-Brisson v. Delta Air Lines, Inc.,
239 F.3d 456 (2d Cir. 2001) 18, 22

Aragon v. Republic Silver State Disposal, Inc.,
292 F.3d 654 (9th Cir. 2002) 25

Ash v. Tyson Foods, Inc.,
546 U.S. 454 (2006) 30

Berquist v. Washington Mutual Bank,
500 F.3d 344 (5th Cir. 2007) 1, 11, 13, 17, 20, 23

Bowman v. Lopereno,
311 U.S. 262 (1940) 2

Coburn v. Pan American World Airways, Inc.,
711 F.2d 339 (D.C. Cir.); *cert. denied*, 464 U.S.
994 (1983) 15, 19-21

Coleman v. Quaker Oats Co.,
233 F.3d 1271 (9th Cir. 2000) 35

Collier v. Budd Co.,
6 F.3d 886 (7th Cir. 1995) 13, 15, 16

Conward v. Cambridge Sch. Committee,
171 F.3d 12 (1st Cir. 1999) 25

Ercegovich v. Goodyear Tire & Rubber Co.,
154 F.3d 344 (6th Cir. 1998) 25

Graham v. Long Island Rail Road,
230 F.3d 34 (2d Cir. 2000) 24, 28

Holland v. U.S.,
348 U.S. 121 (1954) 29

Holley v. Sanyo Mfg., Inc.,
771 F.2d 1161 (8th Cir. 1985) 17, 19

Ingels v. Thiokol Corp.,
42 F.3d 616 (10th Cir. 1994) 15

James v. New York Racing Ass'n,
233 F.3d 149 (2d Cir. 2000) 18, 21

LaGrant v. Gulf & Western Manufacturing Co., Inc.,
748 F.2d 1087 (6th Cir.1984) 17

LeBlanc v. Great American Ins. Co.,
6 F.3d 836 (1st Cir. 1993); *cert. denied*, 511 U.S.
1018 (1994) 16

Lopez v. Gonzalez,
127 S.Ct. 625 (2006) 30

Martinez v. Potter,
347 F.3d 1208 (10th Cir. 2003) 15

Marzano v. Computer Science Corp., Inc.,
91 F.3d 497 (3d Cir. 1996) 16

McDonald v. Santa Fe Trail Transp. Co.,
427 U.S. 273 (1976) 24

McDonnell Douglas v. Green,
411 U.S. 792 (1973) 9, 10, 16, 20-22, 24

McGuinness v. Lincoln Hall,
263 F.3d 49 (2d Cir. 2001) 24, 25

Miller-El v. Dretke,
545 U.S. 231 (2005) 23

Moore v. Frederick,
127 S.C. 2618 (2007) 30

Nidds v. Schindler Elevator Corp.,
113 F.3d 912 (9th Cir. 1997) 18

Oxman v. WLS-TV,
846 F.2d 448 (7th Cir. 1988) 17, 19, 20

Perez v. Tex. Dep't of Criminal Justice,
395 F.3d 206 (5th Cir. 2004) 23, 27

Rachid v. Jack In The Box, Inc.,
376 F.3d 305 (5th Cir. 2004) 8, 17

Smith v. Stratus Computer,
40 F.3d 11 (1st Cir. 1994); *cert. denied*, 514 U.S.
1108 (1995) 24

Sullivan v. Liberty Mutual Ins. Co.,
444 Mass. 34, 825 N.E.2d 522 (Mass. 2005) .. 22

Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002) 11

Vasquez v. County of Los Angeles,
349 F.3d 634 (9th Cir. 2001) 24

Village of Arlington Heights, v. Metropolitan Housing Development Corp.,
429 U.S. 252 (1977) 31

Williams v. General Motors Corp.,
656 F.2d 120 (5th Cir. 1981) 14, 15, 18-21

Williams v. Vitro Services Corp.,
144 F.3d 1438 (11th Cir. 1998) 17

Wilson v. B/E Aerospace, Inc.,
376 F.3d 1079 (11th Cir. 2004) 23

Woodhouse v. Magnolia Hospital,
92 F.3d 248 (5th Cir. 1996) 9, 17

Constitutional and Statutory Provisions

U.S. Const. art. II, § 2 2

28 U.S.C. § 1254 2

Age Discrimination in Employment Act ("ADEA"), Pub. L. 90-202, § 4, 81 Stat. 602 (1967), codified at 29 U.S.C. § 621, *et seq.* 2, 3, 10, 12, 14, 19, 20

Rules

S. Ct. R. 13.3 2

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS OF THE CASE

1. The opinion of the United States District for the Southern District of Texas awarding summary judgment to Respondent is *Berquist v. Washington Mutual Bank*, 2005 WL 2171903 (S.D. Tex. Sept. 7, 2005) (No. CIV. A. H-04-376).

2. The original opinion of the United States Court of Appeals for the Fifth Circuit in No. 05-20956 is *Berquist v. Washington Mutual Bank*, 492 F.3d 576 (5th Cir. 2007). This opinion was withdrawn and superseded on denial of rehearing by *Berquist v. Washington Mutual Bank*, 500 F.3d 344 (5th Cir. 2007).

STATEMENT OF JURISDICTION

1. The judgment for which review is sought was entered by the United States Court of Appeal for the Fifth Circuit on July 12, 2007. App. D., p. 38a.

2. Petitioner Philip Berquist ("Berquist") filed a petition for rehearing. The court of appeals allowed the late filing and considered the motion for rehearing on the merits. App. C, p. 37a. The court denied rehearing by order entered August 13, 2007. *Id.* On August 31, 2007, the court withdrew its original opinion and issued a substituted opinion in response to Petitioner's Petition for Rehearing. App. A, p. 1a.

3. This Petition for Certiorari is timely under Supreme Court Rule 13.3 as the Court of Appeals appropriately considered Petitioner's Petition for Rehearing and issued a revised opinion in response to Petitioner's Motion for Rehearing, thereby demonstrating that the Petition for Rehearing was considered on the merits. App. A, p. 1a; *see also Bowman v. Lopereno*, 311 U.S. 262, 266 (1940) (where court of appeals allows filing and considers merits of petition for rehearing, its judgment does not become final until denial of rehearing). This petition is timely filed on the first working day after 90 days from the denial of rehearing, as required by Supreme Court Rule 13.3.

4. Pursuant to Article II, Section 2 of the Constitution of the United States and 28 U.S.C. § 1254, this Court has jurisdiction to review on a writ of certiorari the claims in this case.

STATUTORY PROVISION INVOLVED

The claims in this case arise under the Age Discrimination in Employment Act ("ADEA"), Pub. L. 90-202, Section 4, 81 Stat. 602 (1967), codified at 29 U.S.C. § 621, *et seq.*, set forth in relevant part in the Appendix E at 40a - 85a.

STATEMENT OF THE CASE

A. Course of the Proceedings and Disposition in the Courts Below.

Plaintiff Philip Berquist ("Berquist") brought this suit against Washington Mutual Bank for violation of

the ADEA in the United States District Court for the Southern District of Texas, Houston Division on January 30, 2004. On September 7, 2005, the District Court entered a Final Summary Judgment Order on behalf of Washington Mutual.

The United States Court of Appeal for the Fifth Circuit affirmed the District Court's Final Summary Judgment Order, but on different grounds than those relied upon by the District Court. The original panel decision was reported at 492 F.3d 576 (5th Cir. 2007). The court's superseded opinion is reported at 500 F.3d 344 (5th Cir. 2007) and is included in Appendix A, pp. 1a - 26a.

B. Statement of Facts

Philip Berquist began working for Bank United in 1984 in the Internal Audit Department, and received a number of promotions during the course of his career. R. 631. In 1994, Berquist was promoted to Vice President - Senior Asset Review Analyst, Asset Review. R. 631. This position is also known as "credit review officer," "loan review officer," or "credit review associate." R. 631, 652, 654. In this position, he was performing loan review or credit review work.

After Bank United merged with Washington Mutual in 2001, his title was changed to "Senior Credit Examiner," but he was still performing loan (or credit) review and was assigned to the Loan Review Department of Corporate Credit Risk Management, performing these duties until he was terminated effective August 1, 2003. R. 632, 917, 931, 936.

Melissa Martinez started at Washington Mutual on September 30, 2002, and shortly thereafter became Berquist's supervisor. R. 633, 641. At that time, Berquist was 54 years old, R. 633, and his department in Houston contained four employees: Berquist, Ron Yancis (age 56), David Plaisance (approximately 39 years old), and Carl Zatopek (approximately 41 years old). R. 606. Martinez was 42 years old during this time. R. 641. Berquist, like Plaisance and Zatopek, exclusively performed SFG work from March 2003 until his termination. R. 634.

Prior to Martinez becoming Berquist's supervisor,[1] Berquist had always received very favorable evaluations during his employment and had never been given any type of counseling, performance warning, or been told any negative information concerning his job performance. R. 633. However, upon his assignment to Martinez, Berquist's career rapidly declined.

On December 9, 2002, Martinez openly advised her staff in a nationwide conference call that she would seek to "attract younger talent." R. 488. Berquist made a contemporaneous note of it, R.922-24, 488, as did Ed Groshens, who was over 60 years old at the time.[2] R. 726-27. Groshens was so alarmed that he called Martinez about the comment that very same day,

---

[1] Berquist's immediate report was Scott Frazee, who in turn reported to Martinez.

[2] In Groshens' notes, Martinez's "younger talent" comment is in bold and accompanied by a star to the side.

hoping that she would retract it or provide some other explanation, but she did neither, rather responding only that the comment was taken "out of context." R. 727.

Less than three months later, on March 4, 2003, and with no advance warning, Martinez issued negative Performance Imp.ovement Notices ("PINs") to Berquist and Yancis, both of whom were at least ten years older than the younger employees in their department. R. 606.

Included in their individual PINS, both Berquist and Yancis were told in identical language that:

> Work product is not produced in a timely manner

Also, both were told in identical language that:

> Execution of assignments is disjointed compromising accuracy and completeness.

Finally, both Berquist and Yancis were criticized for having skills that did not match their position (despite performance evaluations to the contrary) in language that was only slightly differed:

> [Berquist]
> Technical skills and proficiencies are "operational" in nature and not commensurate with the job function, CCR focus, or those required for a Credit Review Officer.

> [Yancis]
> Technical skills and proficiencies are not commensurate with the job function and those required for a Senior Credit Review Officer.

R. 743-744; R. 746.

In addition, the "Action Plan" listed in the PIN to correct the alleged unsatisfactory performance of both Berquist and Yancis is identical. R. 743-744; R. 746.[3] The two younger employees, Zatopek and Plaisance did not receive PINs, R. 665.

Approximately two months after receiving his PIN, Berquist was advised that he had 45 days to apply for other jobs within the Bank or else he would be terminated.[4] R. 633. However, under the Bank's

---

[3] Martinez also issued other performance improvement notices to other subordinate employees across the country, all of whom were over the age of 40. R. 643-644.

[4] The PIN was only to document Berquist's alleged failures, not as any genuine attempt to improve his performance. The PIN's themselves were very general. What little of it that was specific in nature was simply palpably false. For example, Martinez knew that Berquist did not even have any subordinate employees so it would be impossible for him to have created "a demoralizing environment" for them. R. 649, 668, 670.

Moreover, Berquist asked for specifics on what he was doing wrong, but none were provided. He even provided Martinez a detailed response to the PIN asking if any of his assertions were incorrect and requesting a clear understanding of her criticisms. R. 705. Having heard nothing in response, Berquist again

standard guidelines, and under the terms of the PIN, an employee on formal written documentation (such as Berquist's PIN) was ineligible to apply for a transfer. R. 743, 803. Berquist asked that Martinez change his PIN to a "notice of concern" so that he would be eligible to apply for other jobs within the Company, but she refused to do so. R. 803.

Berquist was told that he was ineligible for severance because he was being terminated, not laid off. R. 633-634. Later, the Bank reversed itself on the severance issue, but only if Berquist signed a confidential release agreement, which 1) released his claims of age discrimination, among others, against the Bank, and 2) would bar him from telling future employers about the circumstances of his termination. R. 946-947. Berquist informed the Bank that he would not sign the separation proposal and release on Friday, June 13, 2003. R. 799, 806. As of this time, Berquist was still deemed ineligible for severance since he was being terminated, not laid off. R. 797-798. On Monday, June 16, 2003, the mention of a "layoff" and the transfer of his alleged CBG duties to California, appears for the first time. On June 26, Berquist is told that despite his rejection of the separation proposal, he would be let go anyway because his job was being eliminated in Houston. R. 634. Zatopek and Plaisance were retained and months later offered transfers to the Dallas office. R. 759.

---

requested more details two months later. R. 706. Again, Martinez never responded.

The District Court awarded summary judgment to Washington Mutual on grounds that Berquist failed to meet his *prima facie* case because he was not "qualified" for the job he had been holding for years. App. B, pp. 33a - 34a. The Fifth Circuit Court of Appeals affirmed summary judgment for the Bank, but on other grounds: that Berquist failed to establish the fourth prong of the *prima facie* case (that he was "replaced by someone outside the protected class, replaced by someone younger, or otherwise discharged because of his age"). App. 11a, 23a. In addition, the Court of Appeals, assuming *arguendo* that Berquist had established a *prima facie* case, determined that Berquist "presented no evidence to contradict Washington Mutual's legitimate, non-discriminatory reason for eliminating his position." App. 25a.

SUMMARY OF ARGUMENT

The case law from the courts of appeal is in a state of disarray concerning the fourth prong of the *prima facie* case in cases involving a reduction in force. The Fifth Circuit's standard conflicts with that of other circuit courts with the result that plaintiffs whose evidence would demonstrate a *prima facie* case in one circuit are failing in others.

Some circuit courts look simply to whether younger employees are treated more favorably, while others, including the Fifth Circuit, employ a standard which mimics the ultimate issue in the case: whether the plaintiff has produced "evidence, either circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching its decision." *Rachid v. Jack In The Box, Inc.*,

376 F.3d 305, 309 (5th Cir. 2004). *See also Woodhouse v. Magnolia Hospital*, 92 F.3d 248, 252 (5th Cir. 1996). In requiring proof concerning the ultimate issue in the case, this standard turns the *McDonnell Douglas* standard on its head and requires the employee to rebut the employer's rationale at the *prima facie* stage. In particular, the type of analysis used by the court below has been sharply criticized by the Seventh Circuit Court of Appeals.

Moreover, in requiring evaluation of the plaintiff's ultimate case in the *prima facie* case, this standard has generated additional confusion among the courts as to the proof necessary to demonstrate that co-workers are similarly situated. The court below required Berquist to show, at the *prima facie* stage, that he was "nearly identical" to his coworkers. However, the court derived the "nearly identical" standard from a case which had employed that standard in a jury instruction, not in deciding the *prima facie* case. Given the simple gate-keeping function of the *prima facie* case, it is not appropriate to use such a stringent definition at the *prima facie* stage, if ever. Utilizing this rigorous standard, the court below erroneously determined that Berquist had not shown a *prima facie* case because he was not "nearly identical" to the younger employees retained by the Bank, even though they all were in the same office performing the same work at the time of Berquist's PIN and discharge.

Furthermore, in stating that Berquist submitted "no evidence" to contradict the Bank's "legitimate, non-discriminatory reason" for terminating his employment, the Court of Appeals ignored the

evidence Berquist submitted in support of his *prima facie* case, including evidence of suspicious timing of Berquist's "layoff," in contravention of this Court's and other authorities. Likewise, the Court denied the most plausible and common sense interpretation of Martinez's remark that she wanted to "attract younger talent."

Finally, the court below suggested that if only Berquist had, like Yancis and other older employees, been "willing to follow procedures," he too could have been rehired. It appears that "willing to follow procedures," refers to the signing of a release in exchange for an option to be rehired. App. 25a. The Court appears to hold that an offer of severance in exchange for a release absolves the employer of any unlawful discrimination.

ARGUMENT

A. The Court of Appeals Imposed Unduly Burdensome Hurdles to Establishing the Fourth Element of the *Prima Facie* Case.

The parties do not dispute that the evidentiary framework set forth by this Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) applies to claims under the Age Discrimination in Employment Act of 1967 ("ADEA"), 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.*, and the courts below applied the *McDonnell Douglas* burden-shifting analysis.

The court below employed the following formulation of the *prima facie* case:

> a plaintiff must show that (1) he was discharged; (2) he was qualified for the position; (3) he was within the protected class at the time of discharge; and (4) he was either i) replaced by someone outside the protected class; ii) replaced by someone younger, or iii) otherwise discharged because of his age.

App. A, p. 7a (500 F.3d at 349).

The court evidently used this standard because it considered Berquist not to have appealed his termination as a reduction in force, App. A, p.5a.[5] Berquist waived nothing. He claimed only that he was fired because of his age and that the circumstances leading up to his termination demonstrated that he was targeted because of his age, regardless of how Defendant classified his termination. In fact, Defendant's classification appears arbitrary because Berquist's termination was originally deemed performance-based and then suddenly changed to a lay-off when he rejected a separation agreement. *Cf. Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002)

---

[5] As discussed *infra*, however, this standard differs semantically, but not substantively (except for the "replacement" element), from the standard the court uses in cases of reduction in force. The critical issue here, as in reduction in force cases, is the interpretation of the requirement that plaintiff otherwise show he was discharged because of age. Of course, both sides argued the case on appeal as if the bank's claimed reason for discharge was job elimination.

(prima facie case is a flexible evidentiary standard, not a rigid pleading standard). Significantly, it was the Bank's job, not Berquist's, to assert a legitimate rationale for his discharge. Berquist's appeal was that summary judgment was improperly awarded to the Bank. Indeed, that the Bank would give conflicting evidence as to whether Berquist's position was eliminated or transferred speaks volumes as to the credibility of the Bank's rationale – but the courts below instead erroneously put the burden on Berquist to respond to the Bank's presumptively valid reasons in his prima facie case. Indeed, the court's claim of waiver exemplifies its mechanical analysis of the prima facie case.

By requiring the plaintiff to show that he was "discharged because of his age," the court of appeals improperly required Berquist to meet his ultimate burden of proof at the *prima facie* stage. Moreover, the court's interpretation of this standard was so narrow that it would be impossible for Berquist, much less any other ADEA plaintiff, to fulfill the *prima facie* case requirement. Even though Berquist's evidence shows that he was treated less favorably than younger employees doing the same work, that the reasons for termination were extraordinarily suspicious, and that his supervisor made ageist remarks perceived as alarming not only by Berquist but other older employees, he could not pass the court's test.

As discussed below, the courts of appeal are struggling with the formulation of the fourth prong of the *prima facie* case, particularly in reduction in force cases, and have adopted a variety of different standards. The Fifth Circuit's standard, in general and

as applied by the court below, not only differs in language and reasoning from the standards of other circuits but so far deviates from this Court's authorities that review by certiorari is warranted.

1. By literally requiring that Berquist show "replacement" or else provide ultimate proof of discrimination, the court of appeals departed from the authorities of other courts of appeal.

In considering whether Berquist established a *prima facie* case, the Court of Appeals first decided that "the record does not support a finding that Berquist was replaced by someone either outside the protected class or by someone younger than himself." App. A., p. 12a (500 F.3d at 351). In so holding, the court expressly rejected Berquist's argument that the Bank's decision to eliminate the credit review positions of the two oldest Houston employees while retaining the two younger credit review employees (and months later affording the younger employees the opportunity to transfer to Dallas), demonstrated a *prima face* case of age discrimination.

In reduction in force cases, other circuits have long recognized that an employee need not show replacement as part of the *prima facie* case because "[g]enerally, when a company reduces or restructures its work-force, it does not simply hire a new person to fill the discharged employee's old position." *Collier v. Budd Co.*, 66 F.3d 886, 890-91(7th Cir. 1995). Accordingly, in such cases, "we do not require a plaintiff to prove that he has been replaced by a younger employee." *Id.*

The Fifth Circuit itself has recognized that in a reduction in force case, replacement need not be shown as part of the *prima facie* case. *Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981). In *Williams,* the court held that a plaintiff in a job reduction case under the ADEA could establish a *prima facie* case by:

> (1) ...showing that he is within the protected age group and has been adversely affected discharged or demoted [sic] by defendant's employment decision; (2) showing that he was qualified to assume another position at the time of discharge or demotion; and (3) producing evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.

Williams, 656 F.2d at 129. Amplifying this third element (the fourth in most current formulations of the *prima facie* case), the court explained that the plaintiff's evidence "must lead the factfinder reasonably to conclude either (1) that defendant consciously refused to consider retaining or relocating a plaintiff because of his age, or (2) defendant regarded age as a negative factor in such consideration." *Id.* at 130.

Although the Court of Appeals did not consider the RIF case, it was used the *Williams* standard by requiring Berquist to provide "sufficient" evidence to show he was "otherwise discharged because of his age."

App. A, 12a, 15a (comment not "sufficient.")[6] The standard used by the Fifth Circuit in this case, has been emulated by some circuits and sharply criticized by others. The difficulty with the Fifth Circuit's approach is that where, as here, it is applied rigidly and mechanically, it forces the plaintiff to respond to the employer's rationale and demonstrate pretext at the *prima facie* stage. Because *Williams* was a RIF case, this problem appears most clearly in RIF cases, as discussed below.

2. The Courts of Appeals employ a wide array of "fourth prongs" of the *prima facie* case in RIF cases, and their differences are material.

The Seventh Circuit has formulated the fourth prong of the *prima facie* case in a reduction in force as proof that "younger employees were treated more favorably." *Collier*, 66 F.3d at 891 (citation omitted). The D.C. and Tenth Circuits have utilized a similar approach, and the First Circuit has utilized part of this test. *See Ingels v. Thiokol Corp.*, 42 F.3d 616, 621 (10th Cir. 1994) (in a reduction-in-force, fourth element of *prima facie* case may be established through circumstantial evidence that the plaintiff was treated less favorably than younger employees), abrogated on other grounds by *Martinez v. Potter*, 347 F.3d 1208, 1210 (10th Cir. 2003); *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 343 (D.C. Cir.) (fourth

---

[6] That the Court required the comments to be "sufficient" at the prima facie level exemplifies their approach that the plaintiff must prove his whole case at the *prima facie* level.

prong in RIF is that plaintiff "was disadvantaged in favor of a younger person"), *cert. denied*, 464 U.S. 994 (1983); *compare LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 844 (1st Cir. 1993) (in RIF case, for fourth element plaintiff must demonstrate that employer either failed to treat age neutrally in making its decision to terminate him or retained younger persons in the same position plaintiff held), *cert. denied*, 511 U.S. 1018 (1994).

Recognizing this Court's instruction that the elements of a *prima facie* case may vary "in differing factual situations," *McDonnell Douglas*, 411 U.S. at 802, n. 13, the Third Circuit has likewise recognized retention of younger employees as sufficient for the fourth prong in reduction in force cases. *Marzano v. Computer Science Corp., Inc.*, 91 F.3d 497, 503 (3d Cir. 1996) ("we have held that the fourth prong of the *prima facie* case should be 'relaxed' when the employee's layoff occurred in the context of a reduction in force" and that "it is sufficient to show that he was discharged while the [employer] retained someone [outside the protected class]") (citations omitted).

The touchstone for these cases is that to establish a *prima facie* case, the plaintiff must show that he was treated less favorably than younger employees in similar circumstances. This standard for reduction in force cases "is consistent with *McDonnell Douglas* because it 'requires an employer that releases a protected employee while simultaneously hiring (or not "bumping") younger employees ... to explain its actions without forcing the protected employee to uncover that elusive "smoking gun."'" *Collier*, 66 F.3d at 891

(quoting *Oxman v. WLS-TV*, 846 F.2d 448, 453 (7th Cir. 1988)).

In contrast, the court below required Berquist to show that he was "otherwise discharged because of his age." *Berquist*, 500 F.3d at 351. The court drew this standard from *Rachid*, 376 F.3d at 309, a non-RIF case. However, it is in essence the same as the standard used by the Fifth Circuit in RIF cases: whether the plaintiff has produced "evidence, either circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching its decision." *Woodhouse v. Magnolia Hospital*, 92 F.3d 248, 252 (5th Cir. 1996).

By requiring evidence of discriminatory intent, this standard differs vastly from that employed by the D.C., Third, Seventh, and Tenth Circuits cited above, but is similar to standards utilized by the Sixth, Eighth, and Eleventh Circuits.[7] *See, e.g., Williams v. Vitro Services Corp.*, 144 F.3d 1438, 1441 (11th Cir. 1998) (last prong in RIF case is "evidence by which a fact finder reasonably could conclude that the employer intended to discriminate on the basis of age in reaching that decision"); *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1165 (8th Cir. 1985) (agreeing "with the Sixth Circuit that the 'plaintiff in such reorganization cases must come forward with additional ... evidence that age was a factor in his termination in order to establish a *prima facie* case'") (citation omitted); *LaGrant v. Gulf & Western Manufacturing Co., Inc.*,

---

[7] This is not an exhaustive review of all decisions from each circuit but demonstrates the vast array of standards employed.

748 F.2d 1087, 1090-91 (6th Cir.1984) (fact of termination of a competent employee during economic cutbacks is insufficient to establish a *prima facie* case; rather, the "plaintiff in such reorganization cases must come forward with additional direct, circumstantial, or statistical evidence that age was a factor in his termination in order to establish a *prima facie* case"), citing the Fifth Circuit's opinion in *Williams*, 656 F.2d at 129; *compare Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 917 (9th Cir. 1997) (affording "flexibility," the fourth prong in RIF requires plaintiff to show "through circumstantial, statistical, or direct evidence that the discharge occurred under circumstances giving rise to an inference of age discrimination").

The Second Circuit's fourth prong in a RIF case appears similar to the Fifth Circuit's, but as applied it has proven less exacting than the approach used by the court below, perhaps because the court expressly acknowledged that the plaintiff's burden is *de minimis*. *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 467 (2d Cir. 2001) (fourth prong is "the circumstances surrounding that [adverse employment] action give rise to an inference of age discrimination"); *see also James v. New York Racing Ass'n*, 233 F.3d 149, 152-53, 154, 157 (2d Cir. 2000) (RIF case) (fourth prong is a "preference for a person not of the protected class," and recognizing that plaintiff who was dismissed while younger employees were not, had stated a *prima facie* case).

This difference in standards among the circuits is not a minor or inconsequential issue. Nor have these standards arisen by happenstance, as some of the circuits have pointedly criticized the approaches of

others. *See, e.g., Oxman*, 846 F.2d at 454 (criticizing Fifth Circuit approach); *Holley v. Sanyo Mfg., Inc.*, 771 F.2d at 1165 (8th Cir. 1985) (rejecting D.C. Circuit's formulation in *Coburn*).[8]

3. The Fifth Circuit's standard erroneously requires the plaintiff, as part of the *prima facie* case, to rebut the employer's nondiscriminatory rationale, in conflict with other circuit courts.

As indicated above, the Fifth Circuit's final prong in RIF cases has its genesis in *Williams*, which states it as:

> producing evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.

Williams, 656 F.2d at 129.

The *Williams* "other evidence of intentional discrimination" standard – which effectively was applied by the court below in requiring Berquist to

---

[8] Of course, contrary to the *Holley* court's suggestion, the approach used by the D.C. Circuit in *Coburn* did not allow a *prima facie* case to be shown by mere termination of an employee within the protected group; rather, it also required the retention and/or promotion of younger employees. 711 F.2d at 343. Moreover, the *Coburn* court did not itself observe that its standard would allow anyone in the protected class to "presumptively have a cause of action under the ADEA," rather, that was the argument advocated by the employer.

show he was "otherwise discharged because of his age,"[9] has been thoroughly criticized as "going too far."[10] In particular, the Seventh Circuit Court of Appeals has observed that "[b]y requiring the plaintiff to produce some evidence of discriminatory intent on the part of the employer to make out a *prima facie* case, the [*Williams*] RIF formulation at the very least fuses the '*prima facie*' and 'pretext' steps of the *McDonnell Douglas* method" and "seems to stand the *McDonnell Douglas* approach on its head-in effect, requiring the employee to rebut the employer's putatively legitimate, nondiscriminatory reason for its actions, not the other way around." *Oxman*, 846 F.2d at 454. Thus, "as a practical matter, [the *Williams* approach] transforms the burden-shifting method of proof into the more difficult direct method." *Id.* At worst, the court explained, "under this *prima facie* proof formulation for RIF case, a victim of discrimination no longer can prevail without producing *any* evidence that age was a determining factor in the employer's motivation." *Id.* (original emphasis).

In a similar vein, in *Coburn*, while not directly addressing *Williams*, the D.C. Circuit expressly rejected the employer's argument that an "ADEA plaintiff [be required] to prove something extra to make out a *prima facie* case in a reduction-in-force situation." *Coburn*, 711 F.2d at 343. The employer had argued that in a RIF, the discharged employee will virtually always be qualified and thus more evidence

---

[9] *See* 500 F.3d at 351.

[10] *Oxman*, 846 F.2d at 454.

was necessary at the *prima facie* stage to avoid affording everyone in the protected age group a *prima facie* case. Relying on precedent that "direct evidence of discrimination is not required to prove a *prima facie* case," the court stated that "the exigencies of a reduction-in-force can best be analyzed at the stage where the employer puts on evidence of a nondiscriminatory reason for the firing," for "[i]n this manner the employee always retains the burden of proving discrimination while the employer's situation is analyzed on a case-by-case basis." *Coburn*, 711 F.2d at 343.

These criticisms of the *Williams* approach apply in force to the decision below. By requiring the plaintiff to muster his ultimate proof of discrimination in the *prima facie* case (and in Berquist's case, also by failing to resolve all inferences in his favor and actually weighing evidence against him, as discussed *infra*), the court below required Berquist to rebut the Bank's alleged nondiscriminatory reason – elimination of his job – in his *prima facie* case.

Likewise, it is difficult to reconcile the Fifth Circuit's approach – which requires the plaintiff to produce evidence "from which a factfinder might reasonably conclude that the employer intended to discriminate"[11] with the Second Circuit's holding that the plaintiff's minimal *prima facie* case "requires no evidence of discrimination." *James*, 233 F.3d at 153 (citing *McDonnell Douglas*); *cf. Coburn*, 711 F.2d at

---

[11] *Williams*, 656 F.2d at 129.

343 (direct evidence of discrimination is not required in *prima facie* case).

Because the Fifth Circuit's approach to the fourth prong of the *prima facie* case imposes an onerous burden on the plaintiff and requires the plaintiff to rebut the employer's stated rationale, this Court should grant certiorari to resolve the conflicting requirements among the circuits for the fourth prong of the *prima facie* case. *Cf. Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 467 (2d Cir. 2001) ("Courts, including our own, have struggled with this fourth element of the *prima facie* case, as the language of the element itself has 'gone through various iterations in the years since *McDonnell Douglas* was decided.'") (citation omitted); *Sullivan v. Liberty Mutual Ins. Co.*, 444 Mass. 34, 825 N.E.2d 522 (Mass. 2005) (discussing the many differences in formulations used to express the fourth prong of the *prima facie* case in reduction in force cases).

B. The Court of Appeals improperly required Berquist to be "nearly identical" to younger employees in order to be similarly situated to them, and based on this faulty standard, determined that Berquist did not establish a *prima facie* case.

The court of appeals also differed from the other courts of appeal and this Court's authorities by imposing an unnecessarily rigorous standard for determining whether Berquist was similarly situated to his younger co-workers who were retained, both in the *prima facie* stage and in considering pretext. Berquist's evidence demonstrated that he was

performing the same work as the two significantly younger employees in his department.

As discussed above, this evidence of disparate treatment of younger and older employees performing the same job function, coupled with ageist comments, would have been sufficient to establish a *prima facie* case – and indeed, to raise an issue of fact on the ultimate issue – in most circuit courts. However, the Fifth Circuit imposed an unjustified legal hurdle, requiring Berquist to show at the *prima facie* stage that his circumstances were "nearly identical" to those of the younger men in order to be considered similarly situated to them. 500 F.3d at 353 (citing *Perez v. Tex. Dep't of Criminal Justice*, 395 F.3d 206, 210 (5th Cir. 2004)) (secondary citation omitted)).

The "nearly identical" standard utilized by the court below, while also used by the Eleventh Circuit,[12] is unnecessarily stringent and contrary to the standards set by this court. This Court recently emphasized the probative value of comparisons under circumstances that are not "nearly identical." In *Miller-El v. Dretke*, 545 U.S. 231, 246-47 (2005), found comparison between black jurors and nonblack ones telling despite "some differences." The court further noted:

---

[12] *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1091 (11th Cir. 2004) (plaintiff and comparator "must be similarly situated 'in all relevant respects,'" and comparator "must be nearly identical to the plaintiff to prevent courts from second-guessing a reasonable decision by the employer").

> None of our cases announces a rule that no comparison is probative unless the situation of the individuals is identical in all respects, and there is no reason to accept one. *Id.* at 247, n.6. *See also McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n. 11 ("precise equivalence in culpability between employees is not the ultimate question: as we indicated in *McDonnell Douglas*, an allegation that other 'employees involved in acts against (the employer) of *comparable seriousness* ... were nevertheless retained...' is adequate....").

The position of the other Circuits appears to be less rigid than that of the Fifth and Eleventh Circuit. For example, far from near identity, the Ninth Circuit has held that "individuals are similarly situated when they have similar jobs and display similar conduct." *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2001); *see also Smith v. Stratus Computer*, 40 F.3d 11, 15 (1st Cir. 1994) (in single discharge case, fourth prong of *prima facie* case is "her employer sought a replacement for her with *roughly equivalent* qualifications") (emphasis added), *cert. denied*, 514 U.S. 1108 (1995).

Thus, *similarity*, not *identity*, is the key. "The standard for comparing conduct requires a reasonably close resemblance of the facts and circumstances of the plaintiff's and comparator's cases, rather than a showing that both cases are identical." *Graham v. Long Island Rail Road*, 230 F.3d 34, 40 (2d Cir. 2000); *see also McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001) (plaintiff need not show disparate treatment of an identically situated employee, rather

comparators "must have a situation sufficiently similar to plaintiff's to support at least a minimal inference that the difference of treatment may be attributable to discrimination"); *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 660 (9th Cir. 2002) (citing *McGuinness* as showing the "minimal showing necessary to establish co-workers were similarly situated"); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998) ("plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered similarly situated...."); *Conward v. Cambridge Sch. Committee*, 171 F.3d 12, 20 (1st Cir. 1999) ("Reasonableness is the touchstone: while the plaintiff's case and the comparison cases that he advances need not be perfect replicas, they must closely resemble one another in respect to relevant facts and circumstances.")

Also importantly, the type of heightened analysis employed by the court below does not belong at the *prima facie* stage. Rather, such an in-depth consideration should not take place until the consideration of the ultimate issue of discrimination. *See Conward*, 171 F.3d at 19 ("the time to consider comparative evidence in a disparate treatment case is at the third step of the burden-shifting ritual").

Moreover, even though the evidence showed remarkable similarities[13] – the men were all credit review officers, they all worked in the same

---

[13] Indeed, in Petitioner's view the evidence meets the "nearly identical" standard – but the standard nevertheless is incorrect.

department, and they all had performed the same job function in the relevant time period – the court nevertheless concluded that they were not sufficiently identical to state a *prima facie* case. The court's highly technical analysis concluded (incorrectly) that the requisite identity was missing because even though Berquist worked on SFG files, the two younger men were permanently assigned to SFG work and attended a national SFG meeting that Berquist did not, and the younger men regularly reported to Scott Frazee while Berquist only sometimes reported to Frazee. App. A, p. 3a, 17a.[14]

---

[14] In fact almost all of Berquist's communication was with Frazee, not Granfelt. Granfelt conceded that Frazee was the primary supervisor of Berquist; Granfelt never met Berquist, and only talked to him "at most" three times. R. 884. Virtually all of the written communication, similarly, was with Frazee not Granfelt. R. 1007-10021.

Moreover, the court's own opinion belies any material differences in the men, as it acknowledges that Berquist and the two younger employees all were performing SFG work at the time Berquist was given his PIN – the first discriminatory action directed to Berquist after Martinez made her ageist remarks in late 2002. App. A, p. 17a-18a ("the PIN 'pertained to [Berquist's] SFG work, not the CBG position that Appellee alleges [he] was assigned after he was given his PIN.'"). Obviously, to the extent they were all performing SFG work, Berquist and the two younger men were similarly situated.

The evidence that, after the PIN, Plaisance and Zatopek were invited to a national meeting concerning their SFG duties (to give them specific training in SFG) that Berquist and Yancis were not invited to, seems to only underscore the younger employees' favored status. This appears consistent with insuring that

These facts are a distinction without a difference. Given the parties' different views on whether the employees in this case were similarly situated, the court below at a minimum should have found an issue of fact on that point. Furthermore, in citing *Perez*, the court failed to note that in *Perez* the issue of "similarly situated" arose not at the *prima facie* level but in the jury instruction and on the issue of fact of whether separate issues of misconduct by different employees were sufficiently similar. *Perez*, 395 F.3d at 213.[15]

Ultimately, requiring similarity in circumstances beyond that necessary to render the comparison probative of discrimination is tantamount to making

---

Plaisance and Zatopek remain in the department while doing nothing, training or otherwise, to address any alleged deficiencies with respect to Yancis and Berquist.

[15] The court also states that Berquist failed to refute the assertions in his PIN accurately demonstrated his inability to perform SFG work. However, neither the PIN, nor Berquist's response mentions SFG. By that time it had not been delineated as a separate area of assignment. Moreover, Frazee considered SFG work much easier than CBG work. In fact, he referred to it as a "slam dunk." R. 762. Assigning Berquist more difficult work when he allegedly cannot handle the easier SFG work makes little sense.

Berquist did say, in his response to the PIN, that he did not have specific expertise in credit review, but unfortunately these remarks were taken out of context as Berquist was speaking only relative to his lengthy experience in loan auditing. Relative to Plaisance and Zatopek, however, he had plenty of experience in credit review, and in fact had been given excellent evaluations in credit review prior to Martinez arriving at the Bank.

credibility determinations and weighing the evidence. *See Graham*, 230 F.3d at 42, 43 (noting that at *prima facie* stage district court should not have considered employer's rebuttal evidence and finding district court "unduly inflexible" in determining that plaintiff and comparator were not similarly situated).

C. In deciding that Martinez's ageist comments did not support Berquist's *prima facie* case, the Court of Appeals improperly weighed and assessed their credibility.

Finally, the court below dismissed ageist comments by Melissa Martinez, Berquist's manager, and entirely disregarded other circumstantial evidence, particularly that of suspicious timing. In doing so, it appears to have merely chosen from various alternative interpretations, and made credibility determinations.

First, Martinez's denial of the statement is telling. While she openly stated to the employees in her department that she wanted to "attract younger talent," Martinez nevertheless denies making it, and claims not to remember Ed Groshens approaching her about the comment. R. 676-77. Normally, this denial might reflect negatively on her overall credibility in the face of written, and contemporaneous, contravening evidence.[16] *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000)

---

[16] Even members of Washington Mutual's management acknowledged that this comment, if made, was inappropriate and inconsistent with company policy against age discrimination. R. 884.

(noting general principal of evidence law that "the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'"). However, the Court of Appeals did not consider Martinez's credibility even to be an issue of fact, much less the tone of her remarks and the manner in which Berquist and Groshens perceived them.

Instead, it appears that the court merely constructed a possible innocent interpretation to what, on its face, is an age based remark. Moreover, no one, not Martinez, or any one who heard it, offered such an explanation. Accordingly, the Court usurped the role of the jury and placed a legal burden on plaintiff to essentially disprove any possible innocent motivation behind the comments, in contravention of longstanding precedent concerning the evaluation of evidence. *Cf. Holland v. U.S.*, 348 U.S. 121, 137-38 (1954) (no requirement for prosecution to dispel any alternative theories regarding its evidence supporting conviction of tax fraud).

The Court did, however, overlook the common sense reactions of those who did hear the remark, and its inflection and context. The implication of the court's holding is that courts are better suited to evaluating whether comments such as these are probative of discrimination than lay persons using their experience and common sense. After all, two such lay people, Berquist and Groshens, found such comments ominous and reflective of age discrimination. The example of Groshens is particularly compelling here. Groshens has no claims against the Bank, and the Bank provided no possible reason to distrust his testimony.

Yet, plainly, he knew what the comments meant when he heard them. Obviously, he inferred age bias from these remarks, and, if anything, as one who was there at the time, heard the entire context of the remarks, the inflection in Martinez's voice, and knowing Martinez himself, ought to be better suited to evaluate the nature of the remarks. *Cf. Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (whether use of the term "boy" is evidence of racial animus depends on "context, inflection, tone of voice, local custom, and historical usage").

Nonetheless, the court held that the fact that the comments came months before his termination and were not directed at Berquist personally dispelled any significant probative value. However, while these facts *might* provide reason for an inference other than one supporting Berquist's claim that he was terminated because of his age, it appears odd to conclude that, contrary to the conclusions of two persons who know the context and heard the entire remarks, that *no* reasonable person could come to such conclusion.[17]

---

[17] In criminal cases, where the prosecution's burden is far more than Berquist's burden here, courts have seen fit to allow juries to reach conclusions capable of potentially differing inferences. *Lopez v. Gonzalez*, 127 S.Ct. 625, 629 (2006) (noting a holding that intent to distribute narcotics may be inferred from possession of an amount too large to be used by one individual). In First Amendment cases, also, courts have allowed government officials to reach conclusions about comments much more cryptic than Martinez's. *See Moore v. Frederick*, 127 S.C. 2618, 2524-25 (2007) (The message on Frederick's banner is cryptic ... [b]ut Principal Morse thought the banner would be interpreted by those viewing

Furthermore, the Fifth Circuit's holding violates this Court's teachings to examine the entire record, *as a whole*, using inferences based on common sense and experience. For example, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-67 (1977), this court noted that determining whether invidious discrimination motivated a decision "demands a sensitive inquiry" into the available evidence. *Id.* at 266. As the court noted "the historical background for the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." *Id.* at 267. Likewise, this court then emphasized that the "specific sequence of events leading up to the challenged decision may also shed some light on the decisionmaker's purposes." *Id.* Here, however, the chain of events leading up to Berquist's termination (expressed preference for younger workers, reprimand under suspicious circumstances, and then termination, among others) were ignored, or worse yet, treated as isolated happenstance.

The court also characterized Martinez's references to the "young guys" (Plaisance and Zatopek, who were more than 10 years younger than Berquist and were not discharged) as unrelated to unlawful discriminatory animus. 500 F.3d at 352. Martinez referred to Plaisance and Zatopek as "young guys" when she advised Berquist of his PIN. Notably, Martinez did not issue a PIN to Zatopek or Plaisance, even though one of her complaints to Berquist was

---

it as promoting illegal drug use, and that interpretation is plainly a reasonable one.)

that Zatopek and Plaisance did not have enough work to do and that Berquist should have advised her of that fact. R. 502-503.[18]

Moreover, the comments are also significant because they reflect that Martinez treated Berquist differently from the younger employees. Even though he had no supervisory authority over them, Berquist was criticized for not specifically advising Martinez that the younger employees did not have enough work to do, but as younger employees they were not held accountable for their own failure to advise her of their inadequate work load. R. 502-503, 743.

Moreover, it did not appear important to Martinez that the "senior people" also did not have enough to do. And while Berquist was criticized for not having enough experience in the non-operational side of credit review, the younger employees lack of experience was viewed as a failing of Berquist, but not as a weakness of the younger employees themselves. Moreover, to suggest that Berquist provided a "harmless explanation" to these remarks as the court did, 500 F.3d at 352, is apparently an interpretation of Berquist's remarks; Berquist himself made no such concession.

This is especially true when one considers the timing and sequence of events, as the Court of Appeals

---

[18] As noted above, Berquist responded in detail to Martinez's PIN. In that response, he stated that Martinez had referred to Plaisance and Zatopek as the "young guys" and to him as the "senior officer." Martinez did not respond to these remarks.

neglected to do. First Martinez stated that she would attract younger talent. R. 488, 633, 726-733, 897. Then she issues PINs to employees over age 40. R. 743, 746. Then unexpectedly Berquist, in contrast to younger employees, was advised that his performance is unsatisfactory and received a PIN. He was later told, with no notification of what his specific problems were, that his employment will be terminated if he does not find another job within the Bank within forty-five days. R. 633. His supervisor refuses to lift his PIN even though he is ineligible to apply for other company jobs while the PIN is in place. Soon after, he is given a confidential separation proposal with a release, and only after he refuses to sign it does the Bank tell him that he is being laid off, not termiated. The timing of these events within itself is sufficient to constitute pretext, and much more so a *prima facie* case.

D. The Court of Appeals' opinion appears to equate "following procedures" with "signing a release."

After deciding that Berquist had failed to establish a *prima facie* case, the court below nevertheless assumed *arguendo* a *prima facie* case had been shown and addressed whether Berquist had created a material fact regarding Washington Mutual's stated reason for his termination.

In answering this question in the negative, the court included the following description of events:

> After announcing the decision to relocate the CBG function, both [Berquist and Yancis] were offered a severance package with the option to

> be rehired in another department. This offer required them to sign a release agreement. On September 29, 2003, Yancis, age 58, started a different position in Mortgage Banker Finance with Washington Mutual, *but Berquist chose not to accept the severance package*. Moreover, similarly situated[19] employees *willing to follow procedures* were re-hired within other departments.

App. 25a, 500 F.3d at 357 (emphasis added). The unmistakable implication from the court's description is that if only Berquist had "followed procedures" by signing a release, he too, like Yancis, could have been rehired.

E. The Court of Appeals ignored all of Berquist's evidence in support of his *prima facie* case and held that he had "no evidence" to rebut the Bank's legitimate, nondiscriminatory reason for his discharge.

1. The court below ignored Berquist's evidence, including that which supported his *prima facie* case.

In concluding its opinion, the Court of Appeals stated that "Berquist presented no evidence to contradict Washington Mutual's legitimate, non-

---

[19] The court does not explain how these unnamed employees were similarly situated to Berquist but Plaisance and Zatopek, the "young guys" whose jobs were not eliminated, were not.

discriminatory reason for his eliminating his position." App. A, p. 26a.

The court's own opinion belies this statement. Before reaching the issue of pretext, the court had consumed six pages of opinion analyzing (and ultimately rejecting, incorrectly) Berquist's evidence of a *prima facie* case and pretext. Of course, the same evidence may be considered for both the *prima facie* case and pretext. *Reeves*, 530 U.S. at 151; *Coleman v. Quaker Oats Co.*, 233 F.3d 1271, 1282 (9th Cir. 2000) (plaintiff may rely on same evidence used to establish *prima facie* case or may put forth additional evidence).

2. Berquist has substantial evidence of pretext and discrimination, more than sufficient to defeat summary judgment.

Berquist presented the courts below with ample evidence to create, at a minimum, a material question of fact whether Washington Mutual's articulated reason for Berquist's discharge, that he was laid off in an reorganization, is false. The "lay off" came after numerous attempts, for different reasons, to remove Berquist from his position. First, he was told about his performance and given a PIN. Berquist was later told, without any notification of what the specific problems were, that he would be terminated if he did not find another position within the company in forty-five days. Soon after, he was given a separation proposal and, only after he refused to sign it, did Washington Mutual state that Berquist was being laid off because his job function was moving to California. Later, after Berquist filed an EEOC charge, the Bank rehired Yancis, who, unlike Berquist, had "followed

procedures" and signed a release, but did not file a charge of age discrimination himself. App. 25a.

Berquist's evidence, put simply, leads to the logical conclusion that Martinez wanted Berquist out anyway she could get him out. She originally tried justifying it as a performance issue, but ultimately recanted on this issue and claimed that it was really a lay-off. Even that was transparently pretextual. If this were simply a transfer of job functions to another locale, Berquist could have been transferred to California, as Granfelt testified. R. 890-892. Berquist obviously was not transferred.

Moreover, Berquist, like the other credit review officers including Plaisance and Zatopek, was doing only SFG CRS work at the time he was removed from the company. R. 634. In fact, Berquist had been doing such work since March 2003. R. 850; R. 634. Nonetheless, Berquist was not offered a job in California, was not offered a job in Dallas (jobs which were offered to Plaisance and Zatopek), nor was he offered a job in Dallas when Cynthia Hart indicated she had a position that he could have been considered for. R. 862.

Given such evidence, the Court of Appeals erred in concluding that Berquist had not raised a material question of fact to defeat the Bank's motion for summary judgment.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Joseph Y. Ahmad
Counsel of Record
Ahmad, Zavitsanos & Anaipakos, P.C.
3460 One Houston Center
1221 McKinney Street
Houston, Texas 77010-2009
Telephone: (713) 655-1101
Telecopier: (713) 655-0062

Counsel for Petitioner Philip Berquist

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-20956

[Filed August 31, 2007]

PHILIP BERQUIST, Plaintiff-Appellant,	)
v.	)
WASHINGTON MUTUAL BANK, Defendant-Appellee.	)

On Appeal from the United States District Court for the Southern District of Texas

Before JONES, Chief Judge, and JOLLY and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

We denied Appellant's petition for panel rehearing. In response to the petition for rehearing, the opinion of the court issued on July 12, 2007, at 492 F.3d 576, 2007 WL 2007333 (5th Cir. 2007), is withdrawn, and the following is substituted.

This appeal arises from the district court's grant of summary judgment in favor of Washington Mutual Bank ("Washington Mutual") on Philip Berquist's claim of age discrimination. We affirm the district court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Berquist began his career working in the internal audit department of United Savings Bank. In 1992, Bank United acquired United Savings Bank, which retained Berquist as an employee. Berquist received several promotions during his tenure with United Savings Bank and Bank United. In 2000, Bank United merged with Washington Mutual. Washington Mutual asked Berquist to stay an additional nine months after the merger to help consolidate the risk rating grids used in the two credit review departments. Berquist accepted this offer.

Following this nine-month period, Washington Mutual offered Berquist a permanent position. Berquist held the position of "Senior Credit Examiner, Loan Review Department, Corporate Credit Risk Management." Berquist alleges that he was qualified for the new position, he received "exceeds expectations" performance evaluations in 2001 and early 2002, and he never received written or verbal notices criticizing his job performance. In September 2002, Washington Mutual hired Melissa Martinez to supervise the bank's credit review function, and in early 2003, promoted Martinez to Chief Credit Review Officer. Martinez served as the corporate manager of

Berquist's duties throughout the deterioration of his employment relationship with the bank.

In November 2002, the bank decided to transfer Berquist's then-current job functions from Houston, Texas, to Seattle, Washington. In light of this business decision, Washington Mutual offered Berquist a different job in the credit review department. Washington Mutual contends that Berquist's work tasks, prior to November 2002, only involved operational and administrative duties. After this date, Berquist's job duties required credit review skills. Martinez asked Berquist to work on the "review and approval" of unissued loan reports. Berquist accepted this job position and exclusively focused on "review and approval" work from early November 2002 to February 6, 2003.

In late 2002, the credit review department of the Houston office was staffed by Berquist, age 54, Ron Yancis, age 56, Donald Plaisance, age 39, and Karl Zatopek, age 41. Berquist and Yancis worked in the Commercial Banking Group ("CBG") under the management of Robert Granfelt. Plaisance and Zatopek worked in the Specialty Finance Group ("SFG") under the management of Cynthia Hart, and later under the immediate supervision of Scott Frazee. Frazee's counterpart position in CBG remained vacant, and therefore, Frazee acted as the administrative manager for both groups.

During a December 2002 conference call, Berquist alleges that Martinez said, "Performance issues will be promptly and aggressively dealt with. We will build

leaders internally and attract younger talent." On February 6, 2003, Martinez reported to Berquist that she was "very unhappy" with the Houston office's production. Shortly thereafter, Martinez issued Berquist a performance improvement notice ("PIN"), criticizing Berquist's allegedly negative attitude, poor communication skills, and below standard work product. The PIN also alleged that Berquist's "[t]echnical skills and proficiencies are 'operational' in nature and not commensurate with the job function, CCR [Corporate Credit Review] focus, or those required for a Credit Review Officer."

In response to the PIN, Berquist asked for specific examples, which he never received from Martinez. Berquist denied every allegation of poor work performance in a written response. Berquist conceded that his work experience before the merger was "strictly in an administrative and operational role," and based on his understanding, Washington Mutual asked him to remain with the bank to "continue in [his] administrative and operational duties." Further, Berquist adds that "I have never at any time represented to anyone that I have specific expertise in credit review since my responsibilities at both Bank United and [Washington Mutual] were solely of an administrative and operational nature."

On May 14, 2003, Martinez told Berquist that his skills and proficiencies were no longer needed in the credit review function. Martinez allowed Berquist forty-five days to find a position in another department of Washington Mutual. Berquist asserts that he asked Martinez to downgrade his PIN so as to not prevent an

internal transfer to another position, but she denied this request.

On June 9, Washington Mutual offered Berquist a separation proposal, which he refused to accept. Following this offer, on June 26, 2003, Martinez conveyed to Berquist that he would be laid off in conjunction with a reorganization of the CBG. Washington Mutual contends that it decided for business reasons to eliminate the CBG function in Houston and transfer the group to Seattle or California because the West Coast handled a greater portion of the CBG's asset base. Based on this avowed business decision, Berquist did not receive forty-five days to secure another position.

Berquist filed suit against Washington Mutual alleging violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et seq. ("ADEA"), and Washington Mutual moved for summary judgment. The district court granted Washington Mutual's motion. The court concluded that Berquist failed to establish a prima facie case of wrongful termination based on age discrimination because the record lacked evidence of Berquist's qualifications for his position. Additionally, the court concluded that Berquist failed to establish a prima facie case of "reduction in force" based on unlawful age discrimination because the record lacked evidence of Berquist being qualified for another position in the company. Berquist does not appeal the district court's holding on his claim of reduction in force based on unlawful age discrimination; therefore, we address

whether the district court properly granted summary judgment on his wrongful termination claim.

II. STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo, applying the same legal standards as the district court. *Machinchick v. P.B. Power, Inc.*, 398 F.3d 345, 350 (5th Cir. 2005). In deciding a motion for summary judgment, the court must determine whether the submissions show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Hart v. Hairston*, 343 F.3d 762, 764 (5th Cir. 2003). In deciding whether a fact issue has been created, the facts and inferences to be drawn from them must be reviewed in the light most favorable to the nonmoving party. *Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 412 (5th Cir. 2003). "Even if we do not agree with the reasons given by the district court to support summary judgment, we may affirm the district court's ruling on any grounds supported by the record." *Lifecare Hospitals, Inc. v. Health Plus of Louisiana*, 418 F.3d 436, 439 (5th Cir. 2005) (citing *Forsyth v. Barr*, 19 F.3d 1527, 1534 n. 12 (5th Cir.1994)).

III. DISCUSSION

Under the ADEA, "[i]t shall be unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29

U.S.C. § 623(a)(1). "A plaintiff can demonstrate age discrimination in two ways, either through: direct evidence or by an indirect or inferential [circumstantial] method of proof." *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 309 (5th Cir. 2004). A plaintiff relying on circumstantial evidence must put forth a prima facie case, at which point the burden shifts to the employer to provide a legitimate, non-discriminatory reason for the employment decision. *Willis v. Coca Cola Enters., Inc.*, 445 F.3d 413, 420 (5th Cir. 2006). If a plaintiff produces direct evidence of discrimination, no further showing is required, and the burden shifts to the employer.[1] *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-22, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985).

To establish a prima facie case of age discrimination based on circumstantial evidence, "a plaintiff must show that (1) he was discharged; (2) he was qualified for the position; (3) he was within the protected class at the time of discharge; and (4) he was either i) replaced by someone outside the protected class, ii) replaced by someone younger, or iii) otherwise discharged because of his age." *Rachid*, 376 F.3d at 309 (internal quotations and citations omitted); *Palasota v. Haggar Clothing Co.*, 342 F.3d 569, 575-76 (5th Cir. 2003). Berquist fulfills the first and third elements of a prima facie case: he was terminated from his position and he was a member of the protected class at the time of discharge. With respect to the remaining elements, we first determine whether Berquist fulfilled the second component of a prima

---

[1] Berquist does not present direct evidence of discrimination.

facie case, demonstrating his qualifications for the position of a credit review officer.

A. Whether Berquist was Qualified for the Position

According to Berquist, he met the objective criteria listed in a job posting for credit review officers and held the title of "credit examiner" for two years after the merger. Berquist contends that he has performed the same job since 1994, which includes the operational, audit, and administrative areas of credit review. To the contrary, Washington Mutual argues that absent the reorganization eliminating Berquist's job function, Berquist still could not have remained in his position as a credit review officer. Washington Mutual explains that Berquist lacked any background and experience in credit process review; instead, Berquist only held internal audit positions during his seventeen years at United Savings Bank and Bank United. Washington Mutual maintains that Berquist's prior work experience included cataloging the risk grades of Bank United loans and preparing audit committee reports.

The district court concluded that Berquist was not qualified for his position at Washington Mutual because "the fact that Berquist was given the position of Credit Review Officer in the first place [does not] constitute evidence that he was qualified. To hold otherwise would be to eliminate the qualification element in every case involving termination." The district court's conclusion was error and expressly foreclosed under Fifth Circuit precedent established in

Bienkowski v. American Airlines, Inc., 851 F.2d 1503 (5th Cir. 1988). The record does not reflect that the district court considered *Bienkowski* in its analysis of Berquist's claim; similarly, Washington Mutual did not address *Bienkowski* in its brief to this court.

In *Bienkowski*, an employer alleged that the plaintiff was not qualified for his job as a security representative, even though his performance had been satisfactory for ten years, "because his supervisors became unsatisfied with his work." *Id.* at 1504-05. The employer submitted two affidavits from the plaintiff's supervisors documenting a decline in his performance. *Id.* at 1505. The employer argued that under the *McDonnell Douglas* test, the plaintiff must prove that he performed his job to the standards of his employer. *Id.* Thus, the plaintiff failed to establish a prima facie case. *Id.* This court reasoned that

> [A] plaintiff challenging his termination or demotion . . . can ordinarily establish a prima facie case of age discrimination by showing that he continued to possess the necessary qualifications for his job at the time of the adverse action. . . .
>
> By this we mean that plaintiff had not suffered physical disability or loss of a necessary professional license or some other occurrence that rendered him unfit for the position for which he was hired.

Id. at 1506 & n.3. The court established this rule in order to simplify application of the *McDonnell Douglas* paradigm in the context of termination and demotion cases. The court concluded that in applying this reasoning, "[t]he lines of battle may then be drawn over the employer's articulated reason for its action and whether that reason is a pretext for age discrimination." *Id.* at 1506.

After the merger, Berquist monitored the process of conforming Bank United's risk ratings to Washington Mutual's rating system. Once Berquist completed the conversion, Washington Mutual assigned Berquist to a credit process review position. Washington Mutual interprets Berquist's response to the PIN issued in March 2003, reiterating his skills in the operational and administrative side of credit review, as an admission that he lacked qualifications in the credit review arena. Washington Mutual characterizes his statements as "undisputed evidence," demonstrating that "[Berquist] did not have the skills, experience and background for credit review process work" at Washington Mutual. More specifically, Washington Mutual maintains that Berquist could not lead a credit review examination through origination, administration, and follow-up.

Similar to the plaintiff in *Bienkowski*, however, Berquist possessed the same job qualifications when Washington Mutual terminated him as when Martinez assigned him to the credit review position. Accordingly, Berquist need not show that his performance met Washington Mutual's expectations to establish a prima facie case. Although Washington

Mutual submitted evidence that Berquist's supervisors were not pleased with his performance, this evidence does not prove a lack of qualifications at the prima facie stage. *See Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 681 (5th Cir. 2001) (holding that an employer may not utilize wholly subjective standards by which to judge its employees' qualifications and then plead lack of qualification when its promotion process is challenged as discriminatory); *Lindsey v. Prive Corp.*, 987 F.2d 324, 327 (5th Cir. 1993) (holding that it is not appropriate for the district court to determine whether subjective criteria are bona fide, in effect making dispositive determinations about the employer's credibility, on summary judgment). As aptly stated in *Bienkowski*, "[p]lacing a plaintiff's 'qualifications' in issue at both the prima facie [] and pretext stages of a termination case is an unnecessary redundancy." *Id.* at 1505. Therefore, for the limited purposes of establishing a prima facie case, Berquist demonstrated that he was qualified for his position.

B. Whether Berquist was Otherwise Discharged Because of His Age

The final prong of establishing a prima facie case of age discrimination requires Berquist to show that he was replaced by someone outside the protected class, replaced by someone younger, or otherwise discharged because of his age. *Rachid*, 376 F.3d at 309. The district court did not reach this issue, but the parties presented arguments on this final element before the district court and this court on appeal.

As a starting point, the record does not support a finding that Berquist was replaced by someone either outside the protected class or by someone younger than himself. Berquist argues that Washington Mutual's decision to terminate him and Yancis, the two older employees in the Houston office, while offering the younger Plaisance and Zatopek the option of transferring to the Dallas office proves age discrimination. The undisputed facts surrounding Berquist's job function and Washington Mutual's reorganization, however, do not demonstrate that Berquist was *replaced* by Plaisance and Zatopek. As explained in greater detail below, Plaisance and Zatopek, the SFG credit process reviewers, remained in the Houston office for several months after Berquist's CBG functions were transferred to California. Moreover, Berquist presented no evidence to show who Washington Mutual hired to work in the California office. Therefore, the only path available for Berquist to establish a prima facie case is to show that he was "otherwise discharged because of his age." *Id.*

1. Martinez's Remarks

Berquist asserts that Martinez's comments regarding the desire to "attract younger talent," and her reference to Plaisance and Zatopek as the "younger" credit review officers, support his claim of age discrimination. Statements evince unlawful discrimination only if the comments "first, demonstrate discriminatory animus and, second, [are] made by a person primarily responsible for the adverse employment action or by a person with influence or leverage over the formal decisionmaker." *Laxton v.*

Gap Inc., 333 F.3d 572, 583 (5th Cir. 2003) (citing *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 225 (5th Cir. 2000)). Under this test, Martinez's comments do not constitute evidence of age discrimination.

Martinez made the first comment regarding younger talent in December 2002, six months before Washington Mutual terminated Berquist, and the comment does not at all relate to this employment decision. According to Berquist's contemporaneous transcription of the comment, Martinez stated that "Performance issues will be promptly and aggressively dealt with. We will build leaders internally and attract younger talent." Washington Mutual contends that regardless of whether Martinez expressed an intention to attract younger talent, this remark was too vague and remote in time to show any discriminatory animus on the part of Washington Mutual in terminating Berquist.

Martinez made no mention of replacing older employees with younger recruits or directly hiring younger employees into leadership positions. Unlike other cases in which we have considered remarks as evidence of discriminatory intent, this comment was a broad statement not directed to any particular employee about her management goals and remote in time from Berquist's firing. *See Machinchick v. PB Power, Inc.*, 398 F.3d at 345, 353 (5th Cir. 2005) (supervisor sent e-mail, just weeks before terminating plaintiff, discussing plans to "strategically hire some younger engineers and designers"; supervisor said plaintiff was "inflexible" and "not adaptable"); *Rachid*, 376 F.3d at 313, 315 (holding that employer's ageist

comments "to and about" employee constituted evidence of age discrimination); *Bienkowski*, 851 F.2d at 1507 n.4 (holding that comments requiring the employee to look "sharp" and criticizing an inability to adapt to new procedures constituted evidence of age discrimination); *Palasota*, 342 F.3d at 576 (supervisor sent a memorandum, two months before plaintiff's termination, recommending severance packages for fourteen named employees, all of whom were specifically identified as over fifty years of age, to create "the flexibility to bring on some new players"). Accordingly, in this context, we conclude that this statement is not evidence of age discrimination.

As to Martinez's reference to Plaisance and Zatopek as "younger" employees, Washington Mutual asserts, and Berquist offers no alternative interpretation, that Martinez made this comment to contrast Plaisance and Zatopek with Berquist, the "senior employee" in the department. In his role as the senior employee, Martinez expected Berquist to provide leadership for the inexperienced members of the group. Berquist provides a similarly harmless interpretation of this statement in his response to the PIN, which was written prior to this litigation. Berquist's writes that

> The criticism mentioned repeatedly on March 4 from Ms. Martinez and Ms. Hart was that I did not notify them of the lack of desk reviews being sent to Houston to be performed "by the young guys" in the Houston office. I responded that since I reported directly to Ron Yancis at the time, it was not in my work experience to "go over my boss's head" directly to Credit Review

> management. . . . Ms. Martinez told me that I was a "senior officer" in this office and that other two employees in the department besides former Regional Manager Ron Yancis and myself were inexperienced young men who needed leadership.

Based on Berquist's personal impressions of the statement, we decline to characterize this comment as anything more than a comment unrelated to an unlawful discriminatory animus. Both statements are consistent with Washington Mutual's stated commitment to build leaders internally based on available resources within the corporation. Accordingly, Martinez's comments are not sufficient evidence of age discrimination.

2. Other Circumstantial Evidence

In addition to the above remarks, as stated *supra*, Berquist contends that Washington Mutual's decision to terminate him and Yancis, the two older Houston employees, while offering the younger Plaisance and Zatopek the option of transferring to the Dallas office further supports his claim of age discrimination. According to Berquist, all four employees were performing the same SFG work at the time of his termination. Berquist also maintains that Washington Mutual's age bias prompted Martinez to issue only the older employees a PIN. Berquist contends that Washington Mutual then suggested an internal transfer to resolve his employment issues but refused to facilitate this action because Martinez would not downgrade his PIN.

Washington Mutual contends that the disparate treatment of Berquist and the younger employees, Plaisance and Zatopek, was based on the differing job functions performed by the two sets of employees. Washington Mutual argues that, although Berquist performed overflow work from SFG, everyone in Houston pitched in to work on SFG's reports during downtime. Plaisance and Zatopek were the only two employees, however, with years of experience in this specialty area.

In disparate treatment cases, the plaintiff-employee must show "nearly identical" circumstances for employees to be considered similarly situated. *Perez v. Tex. Dep't of Criminal Justice*, 395 F.3d 206, 210 (5th Cir. 2004) (quoting *Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir. 1991)). Berquist performed an array of jobs after the Bank United-Washington Mutual merger. Berquist initially stayed with the bank, at the request of Don Dahrens, for the specific purpose of assisting with the conversion of Bank United's risk grading system for loans to Washington Mutual's system. In late October 2002, Washington Mutual moved this function to Seattle, Washington, and Berquist no longer worked with converting the risk rating grids.

Martinez then assigned Berquist to a national team reviewing a residential construction portfolio. After the group's first meeting, Martinez removed Berquist from the residential construction portfolio and asked him to assist with the review and approval of credit reports. This assignment involved clearing a large backlog of unissued loan review reports. At some point in early

March, Berquist began working on change request summaries ("CRS"). CRS's require a determination of whether to increase or decrease a customer's credit rating based on a credit review. In her deposition, Martinez explained that the CRS process was segmented into two teams, the SFG and CBG. SFG handled a different business line from CBG, CBG involved a larger work load and larger assets under management. Martinez also stated that "[i]f there was overflow from SFG then that would be allocated, and then Mr. Berquist may have been assigned those."

Martinez's explanation comports with Berquist's account of the work distribution. Berquist testified that during slow periods, after receiving a stack of CRS's in the mail, someone simply grabbed a stack of CRS's without any regard to whether the files dealt with SFG or CBG loans. Berquist also testified in his deposition that after receiving his PIN, the Houston group received an email from either Martinez or Cynthia Hart, the SFG manager, announcing that Zatopek and Plaisance were being permanently assigned to the SFG function. In this capacity, Zatopek and Plaisance attended a national meeting concerning their duties in the SFG position. Berquist and Yancis did not attend this meeting. Moreover, Berquist and Yancis directly reported to Bob Granfelt, and only in the event of a workflow issue did these two employees report to Frazee as their administrative supervisor. Frazee managed the tracking system of work assignments for the Houston office. Finally, to this court, Berquist represented that he was initially assigned SFG work and then assigned to the CBG position. Thus, the PIN and Berquist's response to the

PIN "pertained to [his] SFG work, not the CBG position that Appellee alleges [he] was assigned after he was given his PIN."

The explanations provided by Martinez and Berquist regarding the division of labor in the Houston office demonstrate that Berquist was not similarly situated with Zatopek and Plaisance; therefore, the employment decisions applied to Zatopek and Plaisance cannot be used to support Berquist's claim of age discrimination. Accordingly, based on the uncontroverted evidence, Berquist cannot argue that Zatopek and Plaisance were similarly situated employees treated differently from himself based on unlawful age discrimination.

Berquist also argues that the PIN from Martinez accounts for one additional peg in the series of discriminatory events leading to his termination. Berquist asserts that the PIN supports his claim of age discrimination because it directly conflicts with verbal conversations between himself and Martinez, and only the two older employees, himself and Yancis, received a notice. Berquist also maintains that Frazee refused to participate in the PIN because he did not agree with Martinez's performance assessment.

In early 2003, the Corporate Credit Review department of Washington Mutual consisted of seventy-one percent of employees over 40, and thirty-seven percent of employees over 50. During the reorganization, Martinez issued PIN's to only five employees under her management. Based on Berquist's admission that he lacked skills in SFG

review, his then-current position, it is difficult to interpret the negative evaluation as motivated by age discrimination. On February 27, 2003, Berquist sent an email to Martinez attempting to carve out a position better suited for his operational and administrative skill sets. In the message, Berquist listed his prior work experience and states the following:

> As you know, my overall background has been in auditing and operational review. . . .
>
> In our initial meeting last year, I told you that I really love doing operational reviews. I believe that this is where my greatest strengths are. This is where I believe that I can be of best value to you and the entire Corporate Credit Review organization of Washington Mutual. . . .
>
> As you are aware and can see from the above, there are extensive operations and credit activities located and headquartered in the Phoenix Tower [in Houston, TX]. I would like to volunteer to dedicate my activities to these critical operational and credit areas in Houston and their respective field offices. In addition to documenting and reviewing all of the above operational activities as they relate to Credit Review, I also could attend regular meetings of these groups as they relate to credit issues as not only your representative, but for the team leaders as well.

Prior to the reorganization, and in response to his PIN dated March 4, Berquist wrote the following:

> I have never at any time represented to anyone that I have specific expertise in credit review since my responsibilities at both Bank United and Washington Mutual were solely of an administrative and operational nature. At no time prior to March 4, 2003, was I ever advised that my lack of experience in credit review was an impediment to my continued employment and certainly not that it was grounds for termination.

In his deposition, Berquist once again confirmed that he has no specific expertise in credit review.

To reconcile the admissions in his PIN response and deposition, Berquist proffered that in his opinion, "the skills involved in financial and operational auditing involve some of the same skills that are needed for corporate credit review. I believe that [] inquiries-requires an intuitiveness, a curiosity, and an ability to read and understand financial statements and documents." Berquist never presents evidence to refute the fact that the PIN accurately pinpoints his deficiencies in the credit review skills necessary to be a SFG credit process reviewer.

Berquist also insinuates that Scott Frazee refused to participate in the March 2003 PIN because he had no problems with Berquist's work. To the contrary, Frazee explained in his deposition that he didn't participate in Martinez's evaluation of Berquist

because he didn't have firsthand knowledge for the basis of her concerns and needed time to specifically assess Berquist's work. Frazee described that a process reviewer leads the credit review and a file reviewer conducts the necessary supporting file work. A process reviewer position typically requires at least four to five years of file review experience. Based on Berquist's work product, Frazee assessed that Berquist understood the basic concepts of credit review but lacked the capability and background to provide an appropriate assessment of more complex files.

Ironically, Martinez attempted to use the PIN as a gateway for securing Berquist's long-term employment at Washington Mutual in a department better suited for his self-identified skill sets. Martinez and Julie Aydelotte, an employee relations manager, called Berquist to discuss a transfer to another department within Washington Mutual. Berquist recorded and transcribed many of these telephone conversations. In the initial discussion, on May 13, 2003, Martinez told Berquist that,

> What we want to discuss with you today and what we want you to think about is really working with you to find, to see if we can find you another position within the company. You know, your skill sets and the contribution that you could provide Washington Mutual from a global basis, I definitely think there is some contribution there. The issue really becomes are those skill sets what are needed in the Credit Review function and I think at this point in time the answer is no. But I think we also want

> to recognize the historical performance as far as your contribution to the department and see what we can do to help you.

Also in this conversation, Martinez discussed with Berquist a 45-day period to find another position and her willingness to discuss the PIN with any interested managers within the company. Berquist requested to receive his severance package offered during the acquisition period, but Aydelotte explained that Berquist's working for two years had negated the original severance plan.

Over the next several weeks, Aydelotte and Berquist communicated regarding his search for a new position and the severance package. Berquist resisted applying for another position because (1) Martinez did not completely fill-out his transfer form, and (2) Berquist questioned his ability to transfer in light of the company's policy regarding employees with a negative performance evaluation on file being ineligible for a transfer. Aydelotte advised Berquist that "[w]hat you need to do is to apply on-line if you find something that you are interested in and then we can work through this part with the recruiters." Aydelotte testified in her deposition that, "in the conversation Melissa had with Phil on the May 13th, was that she would authorize a transfer, that it was okay for him to look internally for a position that better suited his experience, and that if he found something I would work with a recruiter and that she would approve him to transfer." On June 10, 2003, Aydelotte offered Berquist the requested 38-weeks severance package in the form of a separation

agreement. Berquist refused the offer because the paperwork included a confidential settlement and release agreement.

Based on this evidence, confirmed and undisputed by Berquist on the pertinent points, the PIN highlighted his self-acknowledged lack of experience with credit review. Washington Mutual documented this skill deficiency, yet at the same time, attempted to retain Berquist in another position. When Berquist refused to look for another position, Washington Mutual offered Berquist a severance package identical to the amount offered at the time of the merger. Berquist then declined this offer. Berquist provides no evidence to diminish the veracity of Washington Mutual's position or to show a causal connection between Washington Mutual's adverse employment action and his age. To the contrary, Berquist readily admits through inconsistent statements that he was not working in the SFG position at the time of his termination, he lacked the skills necessary to perform the work assigned to Plaisance and Zatopek, and he refused to cooperate with Martinez's and Aydelotte's attempts to accommodate his requests. Based on this evidence, a reasonable trier of fact could not determine that Washington Mutual otherwise discharged Berquist based on his age.

C. Legitimate, Non-discriminatory Reason for Discharge

If the plaintiff establishes a prima facie case, "the defendant then must articulate a legitimate, non-discriminatory reason for its decision to terminate the

plaintiff; and, if the defendant meets its burden of production, the plaintiff must then offer sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another "motivating factor" is the plaintiff's protected characteristic (mixed-motive[s] alternative)." *Rachid*, 376 F.3d at 312 (internal quotations omitted).

Assuming arguendo that Berquist established a prima facie case of age discrimination, the undisputed summary judgment evidence demonstrates that Washington Mutual undertook a major reorganization in the Corporate Credit Review department, which eliminated Berquist's position. Berquist fails to raise a genuine issue of material fact regarding the evidence presented to support Washington Mutual's legitimate, non-discriminatory reason for his termination.

Martinez came to Washington Mutual on September 30, 2003, charged with the responsibility of regenerating an underperforming group-develop a strategy and implement the appropriate methodologies to execute the process. Washington Mutual hired Martinez after the acquisition of Bank United and other banks across the country for the sole purpose of reorganizing the credit department. In a memo entitled "Corporate Credit Review: Organizational Realignment," dated December 3, 2002, Washington Mutual provided an overview of the planned organization of the credit review department, including the closing of certain offices and the creation

of new positions. In the December 9 meeting, Berquist recalls Martinez giving notice about a "formal [departmental] reorganization that was going to take several months to complete." In a second undated document, entitled "Corporate Credit Review Business Objective, Houston Commercial Banking Team," Washington Mutual states that

> [W]e have determined that the size of the commercial portfolio in Houston does not justify placement of resources in the local market. Additionally, Commercial Banking business objectives have not identified the Houston market as a high growth area. As a result, we have [made] the business decision to disengage Corporate Credit Review in Houston and build up capabilities in California and New York to support existing and planned growth within the Commercial Banking group.

On June 25, 2003, Berquist and Yancis, both employees of Corporate Credit Review focusing on commercial portfolios in Houston, were notified that their positions would be eliminated. After announcing the decision to relocate the CBG function, both men were offered a severance package with the option to be re-hired in another department. This offer required them to sign a release agreement. On September 29, 2003, Yancis, age 58, started a different position in Mortgage Banker Finance with Washington Mutual, but Berquist chose not to accept the severance package. Moreover, similarly situated employees willing to follow procedures were re-hired within other departments. Shortly thereafter, in July 2003, the

Corporate Credit Risk Management team in Seattle also consolidated, and three positions were eliminated from this department. Two of the employees over the age of forty, Phil Stanley, age 51, and Leone, age 58, accepted different positions with Washington Mutual. Berquist presented no evidence to contradict Washington Mutual's legitimate, non-discriminatory reason for eliminating his position.

IV. CONCLUSION

For the foregoing reasons, we affirm the district court's grant of summary judgment.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-04-376

[Decided September 7, 2005]

PHILIP BERQUIST,)
Plaintiff,)
)
v.)
)
WASHINGTON MUTUAL BANK, F.A.,)
Defendant.)
)

MEMORANDUM AND ORDER

This case arises under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* (ADEA). Plaintiff Philip Berquist alleges that Defendant Washington Mutual Bank's (WAMU) termination of his employment was motivated by his age. WAMU has moved for summary judgment. Having considered the parties' filings, the Court hereby **GRANTS** summary judgment for Defendant.

I. BACKGROUND

The undisputed facts are as follows. Berquist began working for United Savings Bank as an internal audit supervisor in Houston in 1984. In 1992, when United Savings was acquired by Bank United, Berquist stayed on as an internal audit manager. In 2001, when Bank United in turn became part of WAMU, Berquist was offered a separation package but ultimately chose to remain with the company, assisting with the conversion from the Bank United risk rating system to the new WAMU system. He performed this work until late 2002, when Melissa Martinez joined WAMU as head of Corporate Credit Review and reassigned Berquist to the position of Credit Review Officer, a job requiring him to review and approve (R&A) unissued loan review reports. Berquist claims that, during a conference call on December 9, 2002, Martinez remarked that she planned to "attract younger talent" to WAMU.

In February 2003, Martinez visited WAMU's Houston office and criticized the work of each of the employees in Berquist's department, including Berquist himself. During this visit, Martinez reassigned Berquist and others from R&A, instructing them instead to begin preparing Change Request Summaries for loans that had been assigned inaccurate risk levels. One month later, Martinez and another WAMU manager traveled to Houston to give Berquist a Performance Improvement Notice (PIN), a formal written warning that his work was not meeting WAMU's standards. The PIN stated, *inter alia*, that Berquist's "technical skills and proficiencies are

operational' in nature and not commensurate with the job function . . . or those required for a Credit Review Officer." Berquist responded to this criticism by noting that all of his prior experience, both at WAMU and with previous employers, had been operational and administrative in nature. He pointed out that "I have never at any time represented to anyone that I have specific expertise in credit review since my responsibilities at both Bank United and Washington Mutual were solely of an administrative and operational nature." The PIN also stated that Berquist displayed a negative attitude and did not complete assignments in a timely fashion. Berquist responded by requesting detailed descriptions of any incidents giving rise to these criticisms. Despite his repeated inquiries, he never received any additional information.

On May 13 or 14, 2003, Martinez and Human Resources employee Julie Aydelotte conducted a telephone conference with Berquist, during which Martinez advised Berquist to try to find a position within WAMU that was more appropriate to his skills. Martinez warned Berquist that, if he was unable to find such a position within 45 days, he would be terminated. Berquist objected that the PIN made him ineligible to transfer within the company and asked that the PIN be downgraded to a less severe warning. Martinez and Aydelotte repeatedly assured Berquist that he had authorization to seek a transfer within WAMU, but they did not downgrade the PIN. Berquist never identified a more suitable job within WAMU, and he and Aydelotte began discussing severance. On June 26, 2003, however, Berquist was informed that

his position was being eliminated and his function moved to California. Berquist's employment with WAMU terminated on August 1, 2003. He and WAMU were unable to reach a severance agreement.

II. ANALYSIS

A. Summary Judgment Standard

A motion for summary judgment requires the Court to determine whether the moving party is entitled to judgment as a matter of law based on the evidence thus far presented. *See* FED. R. CIV. P. 56(c). "Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Kee v. City of Rowlett*, 247 F.3d 206, 210 (5th Cir.), *cert. denied*, 534 U.S. 892, 122 S. Ct. 210, 151 L. Ed. 2d 149 (2001) (internal quotation marks and citation omitted). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could enter a verdict for the non-moving party." *Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir. 2000). This Court must view all evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Id.*

To survive a motion for summary judgment, an ADEA plaintiff must first establish a *prima facie* case of discrimination. *Bauer v. Albemarle Corp.* , 169 F.3d 962, 966 (5th Cir. 1999). Once a plaintiff has

established a *prima facie* case, the burden shifts to the defendant to present a legitimate, non-discriminatory reason for the challenged action. *Id.* If the defendant can make such a showing, the burden shifts back to the plaintiff to prove that the legitimate reason is a mere pretext for discrimination. *Id.* at 966-67.

B. Berquist Cannot Establish a *Prima Facie* Case of Age Discrimination

It is unclear whether Berquist is claiming that WAMU discriminated against him by eliminating his position (a wrongful termination claim) or by failing to find another position for him (a reduction in force claim). Accordingly, the Court considers each possible claim, concluding that neither can survive summary judgment.

1. Wrongful termination.

To make a *prima facie* case of age discrimination, a plaintiff must ordinarily prove that (1) he is a member of a protected class *(i.e.*, he is more than forty years old); (2) he was qualified for his position; (3) he was discharged; and (4) he was replaced by a non-member of the protected class or by someone younger, or was terminated because of his age. *Id.* at 966. Berquist's claim must be dismissed because he has not advanced any support for the claim that he was qualified for his position.

Berquist's Second Amended Complaint states that "Plaintiff was qualified for the positions he held for the Defendant, and specifically for the position he held at

the time of his termination." (Pl.'s 3d Am. Compl. at 10.) At the summary judgment stage, however, once the movant has identified portions of the record that support its position, the non-movant must "go beyond the pleadings and . . . designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (internal quotation marks omitted). Here, WAMU (the movant) points to Berquist's PIN response, in which he stated, "I have never at any time represented to anyone that I have specific expertise in credit review since my responsibilities at both Bank United and Washington Mutual were solely of an administrative and operational nature." (Ex. A, Def.'s Mot. for Summ. J., at 77-78.) WAMU also points out that Berquist admitted during his deposition that he had no specific expertise in credit review and had never led a credit review. (*Id.* at 60-61.)

In his response to WAMU's motion for summary judgment, Berquist does not provide any evidence that he was qualified for the position of Credit Review Officer. He merely argues that he was qualified for his previous position, that of Senior Credit Examiner, and points to positive reviews of his performance in that position. (Pl.'s Resp. to Def.'s Mot. for Summ. J. at 4.) Even if true, however, his contention that he was qualified for his previous position does nothing to rebut Defendant's allegations and evidence that he was unqualified for the position that he held immediately prior to his termination. While it is not appropriate, at the summary judgment stage, to make factual findings concerning a plaintiff's compliance with subjective standards, summary judgment may be

granted where a plaintiff has, as here, failed to offer any evidence at all that he was qualified for the position from which he was terminated.

Berquist insists that WAMU failed to response to his requests for detailed descriptions of his professional shortcomings. (Pl.'s Resp. at 4-9, 12.) Even if Berquist is correct, however, and WAMU should have provided more information about his performance problems, its failure to do so does not prove that Berquist was qualified for his job. Nor does the fact that Berquist was given the position of Credit Review Officer in the first place constitute evidence that he was qualified. (*See* Pl.'s Resp. at 18.) To hold otherwise would be to eliminate the qualification element of every case involving termination. Therefore, because Berquist has failed to meet his burden of providing factual support for this element of his *prima facie* case, he cannot make a claim of wrongful termination sufficient to survive summary judgment.

2. Reduction in force.

Berquist concedes that his position was eliminated when his department moved to California. (*See* Pl.'s Response to Def.'s Mot. for Summ. J. at 11.) He does not appear to contend that he was replaced by another employee. It appears, then, that his termination was part of a reduction in force (RIF).

> In a[n] RIF case, a *prima facie* case is established by evidence that (1) the plaintiff is within the protected age group under the ADEA; (2) he or she was adversely affected by

> the employer's decision; (3) he or she was qualified to assume another position at the time of the discharge or demotion; and (4) evidence, either circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching its decision.

Woodhouse v. Magnolia Hosp., 92 F.3d 248, 252 (5th Cir. 1996).

Berquist has put forward no evidence that he was qualified for another position at WAMU. Instead, he accuses Martinez and Aydelotte of obstructing his efforts to transfer by refusing to downgrade the PIN. Even if true, however, Berquist's contention that he was prevented from actually transferring does not support a finding that he was qualified for a position at WAMU. Again, Berquist bears the burden of pleading and supporting, at the summary judgment stage, this element of a *prima facie* claim of RIF discrimination. He has not done so. Since he has failed to establish a *prima facie* case for either of his possible claims, Berquist's Complaint is hereby **DISMISSED**, and summary judgment is **GRANTED** for Defendant.

IT IS SO ORDERED.

SIGNED THIS 7TH DAY OF SEPTEMBER, 2005.

/s/
Keith P. Ellison
United States District Judge

FINAL JUDGMENT

Pursuant to FED. R. CIV. P. 58(a), and for the reasons stated in the accompanying Memorandum and Order, **JUDGMENT** is **ENTERED** for Defendant.

IT IS SO ORDERED.

SIGNED THIS 7TH DAY OF SEPTEMBER, 2005.

Keith P. Ellison
United States District Judge

APPENDIX C

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUDGE III
CLERK

TEL. 504-310-7700
600 S. MEASTRI PLACE
NEW ORLEANS, LA 70130

August 13, 2007

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 05-20956 Berquist v. Washington Mutual Bk
USDC No. 4:04-CV-376

Enclosed is an order entered in this case.

Sincerely,

CHARLES R. FULBRUGE III, Clerk
By: /s/ Laura Miles
Laura Miles, Deputy Clerk
504-310-7807

Mr Joseph Y Ahmad
Mr Jeffrey C Londa

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20956

[Filed August 13, 2007]

PHILIP BERQUIST, Plaintiff-Appellant,	)
v.	)
WASHINGTON MUTUAL BANK, Defendant-Appellee.	)

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before JONES, Chief Judge, JOLLY, and STEWART, Circuit Judges.

PER CURIAM:

The petition for rehearing is out of time. The court has allowed the filing of the late petition for rehearing. The petition for rehearing is DENIED

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-20956

[Filed July 12, 2007]

PHILIP BERQUIST, Plaintiff-Appellant,	)
v.	)
WASHINGTON MUTUAL BANK, Defendant-Appellee.	)

On Appeal from the United States District Court for the Southern District of Texas.

Before JONES, Chief Judge, and JOLLY and STEWART, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS A MANDATE: AUG 21 2007

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: /s/ _____
Deputy

New Orleans, Louisiana AUG 21 2007

APPENDIX E

The Age Discrimination in Employment Act

[29 U.S.C. §§ 621-634]

TITLE 29

LABOR

CHAPTER 14 -- AGE DISCRIMINATION IN EMPLOYMENT

§ 621. Congressional statement of findings and purpose
§ 622. Education and research program; recommendation to Congress
§ 623. Prohibition of age discrimination
§ 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports
§ 625. Administration
§ 626. Recordkeeping, investigation, and enforcement
§ 627. Notices to be posted
§ 628. Rules and regulations; exemptions
§ 629. Criminal penalties
§ 630. Definitions
§ 631. Age limits
§ 632. Omitted
§ 633. Federal-State relationship

§ 633a. Nondiscrimination on account of age in Federal Government employment
§ 634. Authorization of appropriations

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens

commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 622. Education and research program; recommendation to Congress

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures—

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various

media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or

privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive

any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the

laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631 (a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, Title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631 (a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub. L. 101–239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control,

of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits—

(A) in the case of a defined benefit plan, the cessation of an employee's benefit

accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year

shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056 (a)(3) of this title and section 401 (a)(14)(C) of Title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053 (a)(3)(B) of this title or section 411 (a)(3)(B) of Title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of

any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414 (q) of Title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of Title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m) of this section.[1]

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411 (b)(1)(H) of Title 26 and

---

[1] So in original.

subparagraphs (C) and (D)[2] of section 411 (b)(2) of Title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411 (b)(1)(H) and 411 (b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002 (24)(B) of this title and section 411 (a)(8)(B) of Title 26.

(9) For purposes of this subsection—

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414 (s) of Title 26.

(j) Employment as firefighter or law enforcement officer

---

[2] See References in Text note below.

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996[3] if the individual was discharged after the date described in such section, and the individual has attained—

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)

(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996,

---

[3] See References in Text note below.

and the individual was discharged, the higher of—

(I) the age of retirement in effect on the date of such discharge under such law; and

(II)age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section—

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because—

(A)an employee pension benefit plan (as defined in section 1002 (2) of this title) provides for the attainment of a

minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002 (35) of this title) provides for—

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under Title II of the Social Security Act (42 U.S.C. 401 *et seq.*), and that do not exceed such old-age insurance benefits.

(2)

(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age—

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501 (c)(17) of Title 26) that—

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an

individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)—

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under Title XVIII of the Social Security Act (42 U.S.C. 1395 *et seq.*);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under Title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)

(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer

Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)—

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans

Notwithstanding subsection (f)(2)(B) of this section, it shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because a plan of an institution of higher education (as defined in section 1001 of Title 20) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if—

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.

§ 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports

(a)

(1) The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include—

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 631 (a) of this title to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 631 (c) of this title, relating to certain executive employees, and the exemption contained in section 631 (d) of this title, relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982.

§ 625. Administration

The Secretary shall have the power—

(a) Delegation of functions; appointment of personnel; technical assistance to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary

to assist him in the performance of his functions under this chapter;

(b) Cooperation with other agencies, employers, labor organizations, and employment agencies to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and

procedures provided in sections 211 (b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633 (b) of this title applies, within 300 days after the alleged

unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630 (a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not

be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)

(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other

employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all

individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

§ 627. Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.

§ 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

§ 629. Criminal penalties

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Equal Employment Opportunity Commission while it is engaged in the performance of duties under this chapter shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: Provided, however, That no person shall be imprisoned under this section except when there has been a prior conviction here-under.

§ 630. Definitions

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means

(1) any agent of such a person, and

(2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if

(1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or

(2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151 *et seq.*], or the Railway Labor Act, as amended [45 U.S.C. 151 *et seq.*]; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed

by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 *et seq.*].

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 *et seq.*].

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus

and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

§ 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the

equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

§ 632. Omitted

§ 633. Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated:

Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the

competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis)

progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631 (b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631 (b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

§ 634. Authorization of appropriations

There are hereby authorized to be appropriated such sums as may be necessary to carry out this chapter.

No. 07-640

In The Supreme Court of the United States

PHILIP BERQUIST,

Petitioner,

v.

WASHINGTON MUTUAL BANK,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

JEFFREY C. LONDA
Counsel of Record
ROBERT L. IVEY
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
500 Dallas Street, Suite 3000
Houston, Texas 77002
(713) 655-0855
(713) 655-0020

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS FOR REVIEW

1. Whether Berquist may raise any issue regarding the proper *prima facie* standard applicable to a claim he did not raise or pursue on appeal before the Circuit Court of Appeals below?

2. Subject to Question 1, whether, in a case involving a reduction in force, any conflict whatsoever exists among the Circuit Courts of Appeals about the fourth prong of a *prima facie* case of age discrimination?

3. Whether any conflict whatsoever exists among the Circuit Courts of Appeals about the appropriate standard for determining whether employees are "similarly situated" for purposes of inferring disparate treatment based on an unlawful discriminatory motive?

4. Whether the Fifth Circuit's holding that the comments attributable to one of Berquist's superiors, when examined in their totality and their undisputed context, are insufficient to create an inference of age discrimination regarding his termination, is erroneous and, even if so, sufficiently significant to warrant review by this Court?

5. Whether any sufficient basis exists for this Court to review a purely factual statement made by the Fifth Circuit regarding Berquist's refusal to sign a release that would have made him eligible for another job within Washington Mutual?

QUESTIONS FOR REVIEW – Continued

6. Whether the Fifth Circuit fully examined and correctly evaluated the evidence presented by Berquist, in the context both of his *prima facie* case and in his case as a whole, in finding such evidence legally insufficient to support his claim?

CORPORATE DISCLOSURE STATEMENT

Respondent Washington Mutual Bank is a wholly owned subsidiary of Washington Mutual, Inc., which is a publicly traded company.

TABLE OF CONTENTS

Page

QUESTIONS FOR REVIEW i

CORPORATE DISCLOSURE STATEMENT iii

STATEMENT OF FACTS 1

ARGUMENT 17

1. Berquist Did Not Appeal or Otherwise Raise Below a Claim That He Was Terminated Because of His Age in Connection with a Reduction in Force, and He Should Be Precluded from Raising It Now 17

2. No Conflict Exists Among the Circuit Courts Regarding the Fourth Prong of a *Prima Facie* Showing in a Reduction in Force Age Case, and the Standard Applied by the Fifth Circuit in the Instant Case is Legally Correct 18

3. No Conflict Exists Among the Circuit Courts Regarding the Evidentiary Showing Required to Demonstrate that Employees are Similarly Situated for Purposes of Inferring Age Discrimination from Disparate Treatment, and the Standard Applied by the Fifth Circuit is Legally Correct 28

4. The Fifth Circuit Correctly Assessed the Statements Attributed to Melissa Martinez, and Fully and Correctly Considered All Other Evidence of Record in Concluding That Berquist Lacked the Evidence Necessary to Proceed With His Claims 33

TABLE OF CONTENTS – Continued

Page

5. Berquist Offers Neither Fact Nor Law to Support His Contention, in His Questions for Review, That the Purported Implications of a Purely Factual Statement by the Fifth Circuit Create a Conflict With Other Circuit Courts 36

CONCLUSION..... 36

TABLE OF AUTHORITIES

Page

CASES:

Bellaver v. Quanex Corp., 200 F.3d 485 (7th Cir. 2000) 23, 24

Berquist v. Washington Mutual Bank, 500 F.3d 344 (5th Cir. 2007) 19

Carson v. Bethlehem Steel Corp., 82 F.3d 157 (7th Cir. 1996) 22, 23

Coburn v. Pan American World Airways, Inc., 711 F.2d 339 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983) 26, 27

Conward v. Cambridge Sch. Committee, 171 F.3d 12 (1st Cir. 1999) 32

Cuddy v. Carmen, 694 F.3d 853 (D.C. Cir. 1982) 27

Dartmouth Review v. Dartmouth College, 889 F.2d 13 (1st Cir. 1989) 32

Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344 (6th Cir. 1998) 32

Graham v. Long Island Rail Road, 230 F.3d 34 (2d Cir. 2000) 31

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 24

Ingels v. Thiokol Corp., 42 F.3d 616 (10th Cir. 1994) 26, 27

Leffel v. Valley Financial Servs., 113 F.3d 787 (7th Cir.), *cert. denied*, 522 U.S. 968, 118 S.Ct. 416 (1997) 22, 23

TABLE OF AUTHORITIES – Continued

Page

Marzano v. Computer Science Corp., Inc., 91 F.3d 497 (3rd Cir. 1996) 25, 26

McDonnell Douglas v. Green, 411 U.S. 792 (1973) 23, 27

Miller-El v. Dretke, 545 U.S. 231 (2005) 28, 29, 30

O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 116 S.Ct. 1307 (1996) 22, 27

Oxman v. WLS-TV, 846 F.2d 448 (7th Cir. 1988) 21, 22

Rachid v. Jack In The Box, Inc., 376 F.3d 305 (5th Cir. 2004) 19

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 24

Smith v. Stratus Computer, 40 F.3d 11 (1st Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995) 31

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742 (1993) 24, 27

Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633 (5th Cir. 1985) 20, 23, 25

Vasquez v. County of Los Angeles, 349 F.3d 634 (9th Cir. 2001) 30

Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981) 19, 20, 21, 24

STATEMENT OF FACTS

In 1984, Petitioner Philip Berquist was hired by United Savings in Houston, Texas, as a supervisor in its internal audit department. (R. 429) To that time, Berquist's entire employment experience, spanning fourteen years, had been in internal auditing in accounting and financial institutions.[1] (R. 427-29) As an audit supervisor with United Savings, Berquist oversaw internal auditors, approved audit and control programs for various bank audits, edited audit reports, and participated in board presentations regarding audit issues. (R. 430)

In 1992, United Savings was acquired by Bank United, with whom Berquist continued his employment. (R. 430) Although his title changed to "internal audit manager," his duties remained essentially the same, at least until 1994. (R. 432) At that time, Bank United made the internal loan review function entirely independent of the credit department and moved it into the audit department. (R. 432) In addition to his other duties, Berquist assisted in bringing loan review under the audit department's purview. (R. 432) Specifically, Berquist monitored loans and loan portfolios to ensure both that they were assigned appropriate "risk grades," and that any

---

[1] Berquist's employment history in the 1970's included seventeen months in the U.S. Army, during which he performed operational audits. (R. 427-28, 489-91)

upgrades or downgrades in risk ratings were correctly recorded in the bank's records. (R. 432, 489-91)

In February 2001, Bank United was acquired by Washington Mutual ("WAMU"). (R. 430-31) Like many other Bank United employees, Berquist was given a separation notice, which included an opportunity to obtain a severance package that would have paid him severance based on his past service with United Savings/Bank United. (R. 433) Before he elected the severance package, however, Berquist was contacted by Don Dahrens, then head of loan review for WAMU, who asked Berquist exactly what he had been doing, in connection with loan review, for Bank United. (R. 433-34) Berquist explained that he had "put together the database" for monitoring the risk ratings for Bank United loans. (R. 434)

Given that information, Dahrens asked Berquist to remain with WAMU through the remainder of 2001 to assist in the conversion of the Bank United risk ratings system to the WAMU system. (R. 434-35) Bank United's system had assessed and assigned risk on an eight-point system; WAMU used a ten-point system. (R. 436-37) Berquist agreed to stay to monitor the rating conversion during the transition, and to coordinate the conversion within WAMU. (R. 436-39) WAMU subsequently acquired another institution, and Berquist performed the same duties concerning the conversion of its risk ratings to the WAMU system. (R. 440)

Berquist continued to assist in the conversion of risk ratings systems until November 2002. (R. 442) At that time, WAMU reorganized the ratings review functions and centralized them in Seattle, Washington, site of the Bank's headquarters. (R. 441-43) The performance of those functions in Houston – and, consequently, Berquist's work on them – ceased. (R. 441-43)

Approximately a month earlier, WAMU had hired Melissa Martinez as the head of Corporate Credit Review. Berquist's first contact with Martinez was in a conference call she initiated with Houston personnel in October 2002, in which she introduced herself, spoke a bit about her background, and told her listeners that her superiors were considering fundamental changes in the structure and procedures of the credit review process. (R. 445-47) Berquist thought that Martinez was "very straightforward" and "no nonsense," and that the conference was a "good meeting." (R. 446-47)

Shortly thereafter, Martinez visited all of the regional offices for a "personal face-to-face" with everyone. (R. 447-48) In Houston, she met first with all employees, and then with each individually. (R. 447-48) Berquist found nothing objectionable about either the group meeting, or his personal one, with her. (R. 448-49) In his individual session, Martinez asked Berquist what his job function was, and he explained his work involving the coordination of consistent loan risk ratings. (R. 449) That job was unique to him in Houston; no one else there performed

that function. (R. 438-39) Martinez did not mention at that time the possible centralization of ratings coordination functions in Seattle, nor did she elaborate on the possible fundamental changes in the credit review process to which she had alluded in her previous conference call. (R. 449-50) Berquist was unconcerned about any possible changes, both because he expected to continue as the sole Houston employee performing his duties, and, most importantly, because he did not consider his duties to be a part of the credit review process that would be affected by any such changes. (R. 449-50)

By early November 2002, however, the decision had been implemented to centralize in Seattle all of the functions hitherto performed by Berquist in Houston. (R. 443-44) Briefly thereafter, it appeared that Berquist would be working on a residential construction portfolio review, but Martinez asked him to assist in what was referred to as the "R&A" function – meaning the Review and Approval of unissued loan review reports. (R. 453-54) A large backlog of such reports existed, and Martinez thought Berquist could assist with them. (R. 455) He did so, as his exclusive job function, from early November 2002 until February 6, 2003. (R. 455-56)

On December 9, 2002, Melissa Martinez convened a conference call with all regional personnel under her authority. (R. 451-52) According to Berquist, the conference lasted "at least" an hour, and addressed operations in multiple cities. (R. 452, 460) Martinez's "overall theme" was the high level of her

expectations for everyone as the department embarked on major changes:

> [Martinez] wanted to make sure that everyone was on the same page . . . with her as far as what she expected from performance; and that it would have to be – she wanted it to be at a very high caliber.
>
> [S]he was not specifically clear if she was unhappy with past performance. I anticipated this primarily to be a statement of her – of where she stood on the issue of performance issues from that time forward because she was talking at that meeting about a departmental reorganization. She was discussing the fact that it was going to be a formal reorganization that was going to take several months to complete and that the workload was going to be different than it had been.
>
> [She] informed us that because of the [credit review process] reorganization that was going to take several months to do, there was going to be a significant decline in the workload and for us to expect that . . . there would be some downtime. But she knew it was going to be a different set of – of types of work that we were going to be doing because she was getting ready to go to the board and senior management with a new corporate credit review plan for the future, which she indicated could very well include the way certain credit, certain types of credits, were looked at compared to the past.

> It was going to be a different type of [credit] review [process] . . . and that – even though it was going to be slow, my recollection is that this was – potentially about past performance, but I think that is was about what she anticipated was her – desires that during this . . . total department reorganization that she expected everyone to stay on focus and on target.

(R. 460, 462-63, 467-68)

Berquist further claims that, in the course of her articulation of her high expectations, Martinez said:

> Performance issues will be promptly and aggressively dealt with. We will build leaders internally and attract younger talent.

(R. 459, 488)

Berquist asserts that, by referring to attracting "younger talent," Martinez expressed bias against older employees. Martinez denies having made such a statement, and contends that anyone who construed her actual comments as an indication of such bias has taken those comments out of context and misunderstood them. (R. 522-24) Berquist admits that Martinez said nothing else in the December 9, 2002, conference call that he believes expressed or reflected alleged age bias. (R. 461-62)

Berquist's next encounter with Martinez came on February 6, 2003, when she again traveled to Houston for a meeting with the department. (R. 457-58) At that time, she administered what Berquist described

as "pretty much of a dressing down" of the department – all four of its employees: Berquist, Donald Plaisance, Ron Yancis, and Karl Zatopek. (R. 458) She was "very unhappy" with the production, or lack of it, in the office. (R. 458) As was generally her style, she was quite direct in her assessments. (R. 458)

Following her session with the group, Martinez again met individually with each employee. (R. 464) Martinez told Berquist that some of her strong criticisms, expressed in the group, did not apply to him, but also noted that Russell Leone – who had been Berquist's primary "supervisor" in connection with his "R&A" work – had expressed that he was not comfortable working with Berquist and had complained of some time delays in Berquist's production.[2] (R. 464-66) Berquist stated that he was "not comfortable" working with Mr. Leone either, and criticized what he perceived as failures of feedback, frequently-changing format guidelines for the reports, and delays by Leone in getting necessary information to Berquist. (R. 465)

According to Berquist, Martinez then told him not to worry too much about Leone's negative opinion of him, because she was reassigning Berquist away from the "R&A" reports. (R. 466) As she had foreshadowed in the December 9, 2002, conference call – in connection with the future fundamental reorganization of the credit review process – Martinez had by

---

[2] Mr. Leone was 57 years old at the time. (R. 529)

February 2003 begun to initiate the reorganization process, which was reflected in a dramatic decrease in actual credit review activities. (R. 467-68) Berquist admits that Martinez had given advance notice that such a slowdown in credit reviews would accompany the reorganization of credit review processes. (R. 502) In the context of this temporary cessation of credit reviews, long-time Houston personnel – i.e., Plaisance, Yancis, and Zatopek – and, beginning in February 2003, Berquist himself, were assigned to conduct Change Request Summaries. (R. 468-69)

A Change Request Summary – or CRS – is a document originally generated by a loan officer who has identified an existing loan which, in the loan officer's opinion, bears a higher or lower risk rating than it should. (R. 468-69) Via a CRS, the loan officer describes the loan and provides all information pertinent to the recommendation, of a higher or lower rating, made by the officer. (R. 468-69) Historically, the review and, if appropriate, either a request for further information or support for the officer's recommendation, or the approval or disapproval of that recommendation, had been made by corporate personnel in Seattle, but a sufficient CRS backlog existed in early 2003 to justify forwarding some of them for review by Houston personnel. (R. 468-69) Indeed, without them, Berquist and others in Houston would have had virtually no work whatsoever to do during the first half of 2003. (R. 469)

Organizationally, credit review activities were divided between the Commercial Banking Group

("CBG") and the Specialty Finance Group ("SFG"). (R. 540-41) CBG focused on business lending – energy loans, syndicated loans, corporate lines of credit, etc. (R. 540-41) SFG activities were real estate based, focusing on home builders finance, mortgage builder finance, commercial real estate portfolios, and multi-family residential portfolios. (R. 540-41) SFG was managed by Cynthia Hart in Seattle; CBG was under Robert Granfelt, also in Seattle. (R. 470, 472, 543-45) In Houston, Berquist and Ron Yancis were CBG personnel; Donald Plaisance and Karl Zatopek were SFG. (R. 470, 472, 520, 544) Beginning in February 2003, Scott Frazee, in SFG, was the direct supervisor of Plaisance and Zatopek and, solely because of a vacancy in his counterpart position in CBG, Frazee was the administrative manager – i.e., he allocated and directed work – for Berquist and Yancis as well. (R. 441) This arrangement made sense not only because there was no CBG counterpart to Frazee to direct Berquist and Yancis, but also because most of the CRS backlog that trickled to Houston involved SFG loans. (R. 469)

On March 4, 2003, Martinez and Hart met with Berquist in Houston to administer a "PIN" – a Performance Improvement Notice. (R. 471, 495) In it, Martinez warned Berquist about various aspects of his recent performance, stemming in large part from the information about Berquist's conduct of "R&A" reviews obtained by Martinez from Russell Leone. (R. 495) Martinez also criticized what she characterized as Berquist's negative attitude toward WAMU in

general, and her own decision-making in particular, since the acquisition of Bank United. (R. 495) Most significantly, however, Martinez noted that Berquist's "[t]echnical skills and proficiencies are 'operational' in nature and not commensurate with the job function, CCR focus, or those required for a Credit Review Officer."[3] (R. 495) Berquist was to improve in all areas, or be subject to further counseling or other action, up to and including possible termination of employment. (R. 495)

Berquist disputed, then and subsequently, almost every aspect of and basis for his PIN. He submitted a response to it, addressing each of its criticisms. (R. 496-503) He demanded proof of his poor attitude, and attributed delays and deficiencies in his "R&A" reviews to the acts or omissions of others. (R. 496-503) Most notably, however, with respect to Martinez's view that his skills and proficiencies were "operational" in nature and not compatible with a credit review process function, Berquist went to great lengths, in his response, ***not to dispute that assessment, but rather to explain why his skills were deficient***. Specifically, he repeatedly emphasized that he had neither ever occupied a position that called upon him

---

[3] This was consistent with the new direction in which the credit review process was developing, one in which the Bank was to examine "not just the transactional aspects to loan review and whether or not a risk rating was correct, but also then taking those issues that we find in the transactional reviews and carrying them forward to identify process weaknesses to the higher level." (R. 542)

to develop or use the skills Martinez found him to lack, nor ever claimed to possess such skills. For example, he emphasized:

> Prior to the acquisition of Bank United by WAMU in February 2001, my position in the Bank United Review Function was ***strictly in an administrative and operational role***.
>
> One month after the acquisition . . . , I was asked . . . to stay an additional ten months through January 31, 2002, to assist in the conversion of Bank United risk ratings to those of WAMU. Nearing the conclusion of the ten months, [I was asked] to become a full-time employee of WAMU and ***to continue in my administrative and operational duties***. . . . I accepted and . . . ***continued these administrative and operational duties*** **for WAMU**. [My boss, Don Dahrens,] ***expanded my administrative and operational responsibilities***. . . . All of my experience at WAMU has been ***in these administrative and operational areas***.
>
> From the above information, it should be clear that ***I have not been involved in anything but administrative and operational duties*** for the department since the acquisition.
>
> ***It should also be clear that my future goals . . . were for me to be continuing***

> ***with the administrative and operational responsibilities.***
>
> ***I have never at any time represented to anyone that I have specific expertise in credit review since my responsibilities at both Bank United and WAMU were solely of an administrative and operational nature.***

(R. 496-99) (emphasis added)

Clearly, Berquist himself did not contend that, contrary to Martinez's assessment, he possessed the necessary credit review skill sets and proficiencies. Instead, he made it clear that he did not have such skills, explained why he did not, and implied that it was somehow unfair or inappropriate that he even be criticized for those deficiencies.

Berquist also noted in his response to his PIN that Martinez and Hart had criticized him for not demonstrating more leadership with respect to the "young guys" in the Houston office. (R. 502-03) Notwithstanding Berquist's arguments that it was someone else's job to do that, he reported that Martinez emphasized that as a "senior officer" in Houston, with less experienced personnel there who needed leadership, she expected him to provide that leadership. (R. 502-03) Berquist's response offered further excuses for his failure to meet these expectations. (R. 502-03)

Following the issuance of his PIN, Berquist's work – such as there was[4] – consisted of CRS review. In early May, Berquist inquired about his future status and Martinez arranged a conference call for May 14, 2003, with him and a human resources representative, Julie Aydelotte. (R. 473-74) In that conference, Martinez explained, again, that Berquist's skill set and proficiencies were simply not those needed in the reorganized credit review process that was being implemented.[5] (R. 475) Consequently, Martinez told Berquist to concentrate his efforts on trying to find another position within the bank that was more compatible with his operational and administrative skills and experience. (R. 475, 504-06)[6] She gave him 45 days in which to find something, and assigned Aydelotte to assist him in this task. (R. 475) In response to his questions, she told him that if he could not find another position, he would have to

---

[4] As Berquist testified, no one in Houston had enough work to keep busy during this period. (R. 473-74)

[5] These were the skill sets and proficiencies Berquist had insisted he did not have, and had never pretended to have, in response to his PIN.

[6] In April 2003, Berquist began surreptitiously tape-recording telephone conversations with various WAMU managers – including Martinez, Aydelotte, Frazee, and Granfelt. He never informed any of them that he was doing so, and never investigated whether doing so violated any state or federal law, including the laws of Washington (where Martinez, Aydelotte, and Granfelt officed and a jurisdiction that has expressly criminalized such actions taken without the consent of all parties, *see* RCW § 9.73.030) or California (Frazee's location). (R. 476-77)

leave. Berquist asked about severance, particularly referencing the Bank United severance package he had foregone when he stayed on with WAMU, and he was told that payment of severance was not customary in circumstances such as these. (R. 475)

Over the ensuing several weeks, Julie Aydelotte encouraged Berquist to look for other opportunities within the Bank, answering his questions and offering her assistance. (R. 475, 507-13) Berquist repeatedly asked about severance again and then, because of a general guideline concerning internal transfers, expressed concern about whether it was proper for him, because he had recently been issued a PIN, to be seeking a job elsewhere within the Bank. (R. 508-10) Aydelotte repeatedly assured him that if he found a desirable alternative position internally, his superior, Melissa Martinez, had the authority to approve and arrange his transfer – and was willing to do so. (R. 508-10)

Notwithstanding Aydelotte's statements, Berquist continued to insist that his PIN prohibited him from seeking a transfer. He asked Aydelotte to have the PIN resolved or nullified; Aydelotte, in return, told him to identify one or more desired transfers, and she and Martinez would take care of the rest. Berquist never identified any transfer position to Aydelotte. (R. 483)

Berquist's ongoing complaints about the unavailability of severance prompted Aydelotte to further

explore that issue. In early June of 2003, with Martinez's approval, Aydelotte conferred with Martinez's boss, Jim Vanacek, the chief credit officer at WAMU. (R. 552-53) She discussed the unique circumstances of Berquist's transition from Bank United and his strong feeling that, if terminated now, he should be afforded at least the same severance package that he had foregone when asked to stay on with WAMU. (R. 552-53, 556) Ultimately, Vanacek approved a severance offer to him under those same terms, in the context of a settlement and release of any claims. (R. 552-53, 556)

Berquist objected to Vanacek's proposal, however, because it contemplated a *confidential* settlement agreement and release which, he contended, would have made it impossible for him to explain to any prospective employer why he had left the Bank. (R. 484-87) He claimed it would have disqualified him from any employment opportunity elsewhere. (R. 484-87) He contrasted the proposal with the severance package he had declined in 2001, which was available to him in the context of a routine post-acquisition reduction in force. (R. 485-86)

Simultaneous with these events, the reorganization of WAMU's credit review process operations continued. In early June of 2003, Robert Granfelt, Berquist's superior as head of the CBG, recommended to his superiors that the regional offices performing credit review functions in CBG be eliminated, and their functions transferred to either Seattle or California. (R. 563-64) In Granfelt's assessment, the

overwhelming workflow for CBG was concentrated on the West Coast, insofar as 80% of CBG's asset base was there (with only 5% in Texas); it only made sense for the credit review process to be consolidated there. (R. 494, 563-64) Consequently, Granfelt recommended that WAMU's two other CBG review locations, in Houston and New York, be eliminated. (R. 564) Because the Bank was then exploring possible acquisition targets on the East Coast, Granfelt's recommendation regarding the New York office was rejected, but his argument that CBG in Houston should be eliminated was adopted. (R. 564)

At that point, Berquist's probable future termination because of his lack of credit review process skills and proficiencies essentially became moot, insofar as, regardless of his skill set, his position was being eliminated. Consistent with that development, on June 26, 2003, Berquist was informed by Martinez and Aydelotte that he was being laid off in connection with the reorganization of CBG operations away from Houston. (R. 554-55, 557) Berquist objected to "how this was handled," complained again about his PIN, and pointed out that 45 days had not elapsed since his May 14, 2003, conversation with Martinez and Aydelotte. (R. 554-55, 557) Although, in response to Berquist's continuing criticism of the bases for his PIN, Martinez again discussed his credit review process skill set deficiencies, she emphasized that, notwithstanding those issues, the Bank had decided, for business reasons, to eliminate the two Houston CBG positions. (R. 554-55, 557) Berquist was told

that his last day for payroll purposes would be August 1, 2003, which would afford him continued health care benefits, at Bank expense, through August 31, 2003. (R. 554-55, 557)

ARGUMENT

1. Berquist Did Not Appeal or Otherwise Raise Below a Claim That He Was Terminated Because of His Age in Connection with a Reduction in Force, and He Should Be Precluded from Raising It Now.

The centerpiece of Berquist's Petition for Writ of Certiorari is that the court below applied an incorrect "fourth prong" in assessing his *prima facie* showing in a reduction in force ("RIF") case. To the contrary, however, and as the Fifth Circuit's opinion expressly states, Berquist did ***not*** appeal the trial court's dismissal of his RIF claims; he appealed ***only*** the dismissal of his non-RIF discriminatory discharge claim, by which he contended that his termination was unrelated to any reduction in force in connection with any Company reorganization and consequent elimination of his job.

Consequently, he now asks this Court to grant review on an issue he never raised below, and on which, obviously, the Fifth Circuit has not even ruled in this case. His Petition should be denied on this ground alone.

2. No Conflict Exists Among the Circuit Courts Regarding the Fourth Prong of a *Prima Facie* Showing in a Reduction in Force Age Case, and the Standard Applied by the Fifth Circuit in the Instant Case is Legally Correct.

Even if this Court excused Berquist's failure to raise below the issues he wants now to litigate, his Petition should be denied. Contrary to its assertions, no "state of disarray" exists among the circuit courts of appeals regarding the fourth prong of the *prima facie* burden in an age discrimination case. Berquist's allegation of "disarray" is based, in part, on language in the opinions of old cases that does not represent the applicable principles of law currently endorsed by the circuit courts that issued those opinions and, in part, on Berquist's distortion of Fifth Circuit authority in an effort to create a conflict, with other circuits, where none actually exists. Most significantly, this Court has clearly enunciated the legal principles governing the elements of a *prima facie* burden in federal employment discrimination cases, and neither the Fifth Circuit – as reflected in the instant case – nor any other circuit court of appeals is deviating from those principles.

In the instant case, the Fifth Circuit stated:

> The final prong of establishing a prima facie case of age discrimination requires Berquist to show that he was replaced by someone outside the protected class, replaced by

> someone younger, or otherwise discharged because of his age.

Berquist v. Washington Mutual Bank, 500 F.3d 344, 351 (5th Cir. 2007), citing *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 309 (5th Cir. 2004). Berquist correctly traces the origin of this *prima facie* standard to *Williams v. General Motors Corp.*, 656 F.2d 120, 130 (5th Cir. 1981), in which the court, discussing the peculiar evidentiary issues typically arising in RIF cases, acknowledged that a plaintiff need not always produce evidence that he was replaced by a younger person, but rather may meet his *prima facie* burden merely by producing "some evidence that his employer has not treated age neutrally, but has indeed discriminated based upon it."

> Specifically, the evidence must lead the fact-finder reasonably to conclude either (1) that defendant consciously refused to consider retaining or relocating a plaintiff because of his age, or (2) defendant regarded age as a negative factor in such consideration.

Id. As the *Williams* court further explained, such evidence of discriminatory intent might take the form of direct evidence – e. g., a statement by the employer that the plaintiff's age was a factor in the adverse action affecting him – or circumstantial evidence – e.g., statistical evidence, evidence of "employer subterfuge," or evidence of disparate treatment of older versus younger employees. *Id.* In short, *Williams* ***expanded*** the categories of evidence by which a plaintiff might sustain his *prima facie* burden, endorsing the

reliance upon any evidence from which reasonable minds could find that the plaintiff's age was a motivating factor in the employer's decision regarding him.[7]

This is precisely the standard, and the analysis built upon it, employed by the Fifth Circuit in the instant case; even the most cursory reading of the court's opinion reveals that it evaluated multiple kinds of evidence offered by Berquist to determine if any was sufficient to sustain his *prima facie* burden. It correctly concluded that none did – i.e., that none constituted evidence from which reasonable minds could find that his termination was motivated by his age.

Although he articulated no complaint whatsoever about this longstanding *prima facie* standard used in the Fifth Circuit in the course of proceedings below – including in his Petition for Rehearing – Berquist now asserts that the standard itself is legally incorrect and in conflict with the *prima facie* standards in use in four other circuits. That is not the case.

---

[7] Although the expansionary nature of the *Williams* decision is readily apparent from the opinion itself, the Fifth Circuit expressly articulated it in *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 643-44 (5th Cir. 1985). There, the court noted that, rather than requiring every plaintiff to show replacement by a younger person, *Williams* allows employees to establish a prima facie case "***through any type of circumstantial evidence that younger employees were more favorably treated than older employees***." (emphasis added)

Although Berquist claims that four circuit courts of appeals apply a *prima facie* standard purportedly in conflict with the Fifth Circuit's, the focal point of his argument is the Seventh Circuit court. Most specifically, Berquist relies heavily on *Oxman v. WLS-TV*, 846 F.2d 448 (7th Cir. 1988), in which the court did, indeed, take issue with *Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981). Quoting directly from *Oxman*, 846 F.2d at 454, in the ostensible context of demonstrating how far the Seventh Circuit diverges from the Fifth, Berquist's Petition reproduces the following criticism in *Oxman* of the Fifth Circuit's decision in *Williams*:

> [B]y requiring the plaintiff to produce some evidence of discriminatory intention on the part of the employer to make out a *prima facie* case, . . . [*Williams* means that] . . . a victim of discrimination no longer can prevail without producing *any* evidence that age was a determining factor in the employer's motivation. (original emphasis)

Certainly, if this *were* the law in the Seventh Circuit, a significant split of authority would indeed exist, not only with other circuit courts, but with this Court as well. After all, *Oxman* asserts that *no actual evidence of discriminatory intent* is required to sustain a *prima facie* showing. Taken further, because a valid *prima facie* showing entitles a plaintiff to judgment if the employer articulates no nondiscriminatory reason for the decision in question, the logical consequence of the language in *Oxman* would necessarily be

that a plaintiff may prevail on a claim of intentional age discrimination without ever adducing any evidence of any such thing.

What is concealed by Berquist's reliance upon a twenty-year-old decision, however, is the fact that the Seventh Circuit has recognized the error in *Oxman's* concept of the *prima facie* burden and, although it has not expressly repudiated the language underlying *Oxman's* criticism of *Williams*, its subsequent decisions have eliminated any meaningful disagreement with *Williams*. The stimulus for the change was undoubtedly this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S.Ct. 1307 (1996). Indeed, shortly after *O'Connor*, in *Leffel v. Valley Financial Servs.*, 113 F.3d 787 (7th Cir.), *cert denied*, 522 U.S. 968, 118 S.Ct. 416 (1997), the Seventh Circuit discussed and explained, at length, the nature of the *prima facie* burden in a disparate treatment discrimination case, as enunciated in *O'Connor* – and, thereby, repudiated, *sub silentio*, the very language in *Oxman* on which Berquist relies in alleging that a conflict currently exists between the Fifth and Seventh Circuits.

Leffel began with *O'Connor's* statement that the *prima facie* case "requires evidence adequate to create an inference that ***an employment decision was based on an illegal discriminatory criterion.***" *Leffel*, 113 F.3d at 792, citing *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996), quoting *O'Connor*, 517 U.S. at 312-13 (emphasis in *O'Connor*). *Leffel* went on to state that to satisfy the

fourth element of the *prima facie* case under the *McDonnell Douglas* framework[8], a plaintiff would have to show "that the circumstances surrounding her . . . discharge indicate that ***it is more likely than not that her [protected characteristic] was the reason for [the discharge].***" *Leffel*, 113 F.3d at 794. Finally, the court in *Leffel* noted, much as the Fifth Circuit had done in *Williams* and *Thornbrough*, that evidence of disparate treatment – i.e., that a similarly situated younger employee was treated more favorably than the plaintiff – is only one of many methods by which a plaintiff might create an inference of discriminatory animus. All that is necessary is that there be evidence "reasonably suggesting that the employer would not have taken adverse action against the plaintiff [absent the protected characteristic]." *Id.* at 794, citing *Carson*, 82 F.3d at 158.

> Any demonstration strong enough to support a judgment in the plaintiff's favor if the employer remains silent will do, even if the proof does not fit into a set of pigeonholes.

Leffel, 113 F.3d at 794, quoting *Carson*, 82 F.3d at 159.

The Seventh Circuit further clarified the fourth prong of the *prima facie* standard in *Bellaver v. Quanex Corp.*, 200 F.3d 485, 494 (7th Cir. 2000) – a RIF case – in which it identified the showing that

---

[8] *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

must be made as one that would "tend to prove that the employer carried out the RIF in a discriminatory way." Noting both that a properly established *prima facie* case is alone sufficient, if the employer remains silent, to support a judgment of intentional discrimination, ***and*** that the ultimate burden of persuading the trier of fact that ***discriminatory animus caused the adverse employment action*** rests at all times with the plaintiff, the court made it clear that the fourth prong of the *prima facie* case requires the production of actual evidence – either direct or circumstantial – of discriminatory intent. *Id.* at 493, citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993)("We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate fact finder determines . . . ***that the employer has unlawfully discriminated.***").[9] (emphasis in original) This is precisely the standard enunciated by the Fifth Circuit in *Williams* (and applied to Berquist's evidence in the instant case).

The (inaccurate) notion that the Seventh Circuit's *prima facie* standard conflicts with the Fifth Circuit's is the lynchpin of Berquist's assertion that a

---

[9] *See also, Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141 (2000) (In a disparate treatment case, liability depends on whether the protected trait "actually motivated the employer's decision" – "that is, the plaintiff's age must have "actually played a role in [the employer's decisionmaking] process and had a determinative influence on its outcome."), quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

"state of disarray" exists among the circuits on this issue. Although he claims that the Third, Tenth and D.C. Circuits also differ with the Fifth Circuit's formulation, he cites no case from any of those circuits in which the Fifth Circuit's standard is criticized – or, for that matter, addressed at all. More significantly, Berquist fails to identify any holding, or pertinent language, in any decision from any of those circuits that truly conflicts with the Fifth Circuit's *prima facie* standard.

For example, with regard to the Third Circuit, Berquist relies on *Marzano v. Computer Science Corp., Inc.*, 91 F.3d 497 (3rd Cir. 1996), which held that a plaintiff in a RIF case sustains his *prima facie* burden by showing that "he was discharged while the [employer] retained someone [outside the protected class]." *Id.* at 503. Obviously, on its face, this standard does not conflict with the Fifth Circuit's, insofar as the latter's standard clearly permits a plaintiff to proceed by showing that he was disfavored in comparison with someone either outside the protected class, or substantially younger. *Thornbrough*, 760 F.2d at 643-44 (a plaintiff may establish a *prima facie* case "through any type of circumstantial evidence that younger employees were more favorably treated than older employees.").

Moreover, nothing about the *Marzano* decision suggests that a plaintiff may establish a *prima facie* case in the Third Circuit without producing any evidence of discriminatory intent. To the contrary, *Marzano* makes it clear that a showing that a qualified

older employee was discharged while younger employees were retained is sufficient precisely because it creates an inference that the plaintiff's age was a factor in the decision. 91 F.3d at 507-08.[10] As the decision explains, "What makes an employer's personnel action unlawful discrimination is *the intent behind that action*." *Id.* at 507. (emphasis added) Direct evidence of such intent is unnecessary; improper motivation is often indicated by inference. The allocation of evidentiary burdens in such cases, including those enunciated in *prima facie* standards, is designed to permit proof of unlawful intent by inference – not to eliminate the need for any proof of such unlawful intent whatsoever. *Id.* at 507-08. Nothing in *Marzano* is remotely inconsistent with the *prima facie* standard applied by the Fifth Circuit in the instant case.

With respect to the purported conflict between both the Tenth and D.C. Circuits, and the Fifth Circuit, Berquist relies on *Ingels v. Thiokol Corp.*, 42 F.3d 616 (10th Cir. 1994), and *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339 (D.C. Cir.), *cert denied*, 464 U.S. 994 (1983). In both cases, the standard for the fourth prong of the *prima facie* case

---

[10] The central issue in *Marzano* was whether the trial court erred in holding that, even though the employer had treated younger employees more favorably than Marzano, the fact that it had also treated some older employees more favorably was enough to defeat his *prima facie* showing. The Third Circuit reversed the lower court on this point, which is not at issue in the instant case.

requires a showing that the plaintiff was treated less favorably than – or "disadvantaged" in favor of – younger employees. *Ingels*, 42 F.3d at 621; *Coburn*, 711 F.2d at 343. As has been amply demonstrated herein, such a standard is in no way inconsistent with the Fifth Circuit's standard. Moreover, neither *Ingels* nor *Coburn* contains any suggestion, or supports any inference, that either the Tenth or the D.C. Circuit would find that a *prima facie* case had been established in the absence of any evidence whatsoever – direct or circumstantial – that the adverse employment decision regarding the plaintiff had been motivated by discriminatory animus. *See Ingels*, 42 F.3d at 621 (sufficient *prima facie* evidence is that from which "a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue"); *Coburn*, 711 F.2d at 342-43, endorsing the *prima facie* burden enunciated in *Cuddy v. Carmen*, 694 F.2d 853, 857 (D.C. Cir. 1982) (To make a *prima facie* case, a plaintiff must demonstrate facts sufficient to create a reasonable inference that age discrimination was a determining factor in the employment decision; absent evidence to the contrary, the plaintiff is entitled to a judgment of discriminatory treatment).

In sum, regardless of the particular circuit court of appeals on which Berquist chooses to focus, there exists simply no material conflict with respect to the *prima facie* burden of a plaintiff in Berquist's situation. This Court, in *McDonnell Douglas*, *O'Connor*, and *Hicks*, has established that the *prima facie* case

must encompass some evidence of discriminatory intent, and all circuit courts have endorsed formulations of the fourth prong of the *prima facie* case designed to accommodate plaintiffs who adduce such evidence. Given Berquist's complaints, it is ironic that the Fifth Circuit's standard, in its actual articulation (but not its substance), is, perhaps, the most accommodating of all the circuits, but insofar as it merely ensures that any evidence creating an inference of discriminatory intent will suffice, it is consistent both with this Court's, and with its sister circuits' current governing holdings on this subject.

3. No Conflict Exists Among the Circuit Courts Regarding the Evidentiary Showing Required to Demonstrate that Employees are Similarly Situated for Purposes of Inferring Age Discrimination from Disparate Treatment, and the Standard Applied by the Fifth Circuit is Legally Correct.

Berquist's Petition also complains about the Fifth Circuit's requirement that, to create an inference of discrimination based on comparison of his treatment with that of younger employees, his circumstances must be "nearly identical" to those of the younger persons. According to him, that requirement conflicts both with this Court's "authorities" and with holdings of other courts of appeals.

With respect to the purported conflict with this Court's "authorities," however, Berquist's Petition cites only one case, *Miller-El v. Dretke*, 545 U.S. 231,

246-47 (2005). *Miller-El* hardly supports Berquist's contention, however, both because it has nothing to do with comparisons of similarly situated persons in the context of an employment discrimination *prima facie* case, and because, even in its own context, it does not even analyze the same "nearly identical" standard.

First of all, *Miller-El* is a case in which this Court evaluated whether a state prosecutor violated the United States Constitution by using its peremptory challenges to exclude blacks from a jury impaneled in the criminal trial of a black defendant. This Court found such a violation, in part because the prosecution used ten peremptory challenges to exclude black venire members – thereby eliminating 91% of all black venire members – and in part because the reasons used to justify such challenges were equally applicable to non-blacks who were not challenged. *Id.* at 240-41. In other words, the collection of voir dire responses, which were specifically identified by the prosecutors as having been material to their challenge decisions, were also made by unchallenged, non-black individuals. From this Court's view, when the factors expressly identified by the decision-maker as being dispositive were shared by other, acceptable jury candidates of another race (who were seated earlier in the strike sequence), an inference of unconstitutional discrimination is warranted. *Id.* at 252.

In the context of these findings, the Court rejected the argument that such an inference was unwarranted unless the challenged black venire

members and the unchallenged non-black ones were "identical in all respects." In so doing, the Court emphasized that a rule of absolute identity was unnecessary, implicitly providing, in such cases, that the prosecution's articulated reasons for exercising its peremptory challenges to strike persons of a particular race will not validate such challenges where consistent application of those same reasons would have eliminated members of other races.

Thus, the most that can be drawn from *Miller-El* is that comparisons of similarly situated persons need not be based on absolutely identical circumstances and situations, but must involve circumstances and situations of material importance to the decision being made. That is, in fact, the analysis that the Fifth Circuit, and all other circuits, apply in disparate treatment employment cases – regardless of how that analysis is labeled.

For example, in *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2001) – cited by Berquist as, purportedly, an example of the split of circuit authority on this point – the court found that an employee subjected to discipline is similarly-situated with another employee of a different protected characteristic where they have similar jobs and display similar conduct. As actually applied, that meant that they were employed in the same position, had committed the same offense, and that their conduct – in the commission of that offense – was of comparable seriousness. *Id.* In other words, with respect to all factors and considerations that would reasonably be

expected to make a material difference in how employees were to be disciplined, those employees must be "similar" to permit an inference that any difference in their discipline is attributable to any impermissible factor.

In the same manner, other cases cited by Berquist reveal the same analytical approach to the question of whether a co-worker is "similarly situated" for purposes of inferring disparate treatment based on a protected characteristic. In *Smith v. Stratus Computer*, 40 F.3d 11, 17 (1st Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995), the court found that similarly-situated employees were those who were similar "in all relevant aspects," which included their performance history, their qualifications, and their conduct in the relevant context. Moreover, where there existed differences or mitigating circumstances with respect to one employee, that would distinguish his or her situation from that of the other, the employees were not similarly situated. *Id.*

Likewise, in *Graham v. Long Island Rail Road*, 230 F.3d 34, 40 (2d Cir. 2000), the court held that plaintiff and his "comparator" must share a "close resemblance of the facts and circumstances" material to the employment decision being challenged. That meant that the comparators must be similar "in all material respects," including the identity of their supervisors, the nature of their conduct, their performance quality and history, and their prior disciplinary record. *Id.*

Berquist also includes the Sixth and the First Circuits among those that, according to him, disagree with the Fifth Circuit's "nearly identical" standard for evaluating the employer's treatment of alleged comparators. Berquist notes that the Sixth Circuit, in *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998) rejects the notion that there must be an "exact correlation" between employees for a comparison to create a valid inference of disparate treatment, but his Petition fails to inform the Court that the actual standard endorsed in *Ercegovich* provides that the plaintiff must prove that all of the "relevant aspects" of his employment situation were "nearly identical" to those of the non-minority comparator's employment situation. *Id.* at 352.

The First Circuit's standard, enunciated in *Conward v. Cambridge Sch. Committee*, 171 F.3d 12, 20 (1st Cir. 1999) is not materially different. Although it rejects the notion that an "exact correlation" between employees is necessary, it requires that they be similar in "all relevant respects" such that they "closely resemble" each other with respect to all material facts and circumstances. *Id.* "In other words, apples should be compared with apples." *Id.*, quoting *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 19 (1st Cir. 1989).

Thus, whether characterized as "nearly identical," "similar in all relevant respects," "closely resembling," or "comparing apples to apples," no material difference exists among the standards in the various circuit courts for evaluating whether employees are

similarly situated for purposes of inferring disparate treatment. The Fifth Circuit's decision in the instant case demonstrates that, in Berquist's situation, he did not possess the same background, experience, or expertise as his co-employees Plaisance and Zatopek – those with whom he wishes to compare himself – nor was he employed in the same position, in the same business unit, or under the same superior. The court below erred neither with respect to the standard it applied in finding him not similarly situated with them, nor in its actual application of that standard.

4. The Fifth Circuit Correctly Assessed the Statements Attributed to Melissa Martinez, and Fully and Correctly Considered All Other Evidence of Record in Concluding That Berquist Lacked the Evidence Necessary to Proceed With His Claims.

Berquist's contention that the Fifth Circuit "improperly weighed and assessed [the] credibility" of statements attributed to Melissa Martinez is completely meritless. Even the most casual reading of the decision below reveals that the court never ***deemed true*** her denial that she had ever made those statements. Instead, the court, as it is required to do, assumed that the statements were made, but examined them in their totality (as they were reported by Berquist himself), in their undisputed context, and at the time they were made. Rather than assessing Martinez's credibility regarding them, the court

accepted Berquist's version of them, but found them legally insufficient to create any genuine issue of fact about the motivation behind his termination – which, the undisputed evidence revealed, occurred in connection with the reorganization of his business unit – which necessitated the elimination of his position – some nine months later, and, in any case, after he, himself, had adamantly insisted that he lacked the skills and experience necessary to perform the job to which he was assigned.

Berquist's complaints about Martinez's reference to Plaisance and Zatopek as the "young guys" are likewise misplaced; in fact, that reference further demonstrates the nondiscriminatory nature of her previous comments. The court below did not "assess [her] credibility" to find, somehow, that she did not make the comment. Rather, it found that the only reasonable construction of Martinez's "young guys" comment, in its undisputed context, could not be that it was an expression of age bias against Berquist; it was, in fact, corroborative of and consistent with the statement previously attributed to her, in which she had emphasized to her subordinates that

> Performance issues will be promptly and aggressively dealt with. We will build leaders internally and attract younger talent.

In other words, Berquist had not responded as a senior leader should, and his failure on that point was being promptly addressed.

In short, the court below found, after a thorough review and analysis of all of the facts in the case, that these comments attributed to Martinez, in their undisputed context, did not constitute any evidence from which reasonable minds could find that his termination months later, after the elimination of his position, was motivated by age bias. Its finding was correct.

Among Berquist's contentions further related to this point, however, is the astonishing assertion that the court below did not examine the "entire record, as a whole," in reaching its conclusions about the evidentiary deficiencies in his case. To the contrary, every "fact" argued by Berquist – the statements about "attracting younger talent" and referencing the "young guys;" the circumstances surrounding the assessment of the PIN against him; his allegation that he was similarly situated to Plaisance and Zatopek for comparison purposes; his contention, notwithstanding his own statements directly to the contrary, that he was qualified to perform his job; etc. – was fully and completely addressed in the Fifth Circuit's decision. It overlooked nothing.

5. Berquist Offers Neither Fact Nor Law to Support His Contention, in His Questions for Review, That the Purported Implications of a Purely Factual Statement by the Fifth Circuit Create a Conflict With Other Circuit Courts.

Although Berquist's Petition articulates, among its "Questions for Review," the issue of whether the Fifth Circuit "has varied far from the other circuit courts of appeal" by a purely factual comment about Berquist's refusal to sign a release – while other WAMU employees affected by the CBG reorganization did so – he presents no argument or citation of authority elaborating upon this purported "variation." WAMU respectfully submits that the lower court's language in question is not reasonably susceptible to the tortured and nefarious construction Berquist attempts to inflict upon it. Even if it were, however, in the absence of any authority whatsoever suggesting that such a construction is somehow improper, Berquist's Petition should be rejected.

CONCLUSION

Berquist's Petition claims conflicts among the circuits, and legally incorrect holdings, in the decision below dismissing his claims – but substantiates neither. The Fifth Circuit employed the proper legal

analyses in this case, and properly applied them. Berquist's Petition should be denied.

Respectfully submitted,

JEFFREY C. LONDA
Counsel of Record
ROBERT L. IVEY
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
500 Dallas Street, Suite 3000
Houston, Texas 77002
(713) 655-0855
(713) 655-0020

Counsel for Respondent

FILED
JAN 17 2008
OFFICE OF THE CLERK
SUPREME COURT

No. 07-640

In The
Supreme Court of the United States

PHILIP BERQUIST,
Petitioner,

v.

WASHINGTON MUTUAL BANK,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

JOSEPH Y. AHMAD
Counsel of Record
AHMAD, ZAVITSANOS & ANAIPAKOS, P.C.
3460 ONE HOUSTON CENTER
1221 MCKINNEY STREET
HOUSTON, TX 77010
(713) 655-1101
(713) 655-0062 FAX
Counsel for Petitioner

January 17, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

I. Berquist Has Not Waived any Issue Concerning his Termination on Reduction in Force grounds 1

II. Respondent's Argument Confirms the Confusion Among the Courts as to the Purpose and Requirements of the *Prima Facie* case, particularly where a Plaintiff does not show replacement. 4

III. "Nearly Identical" is not the Same as Similar "in all Relevant Respects." 9

IV. The Court of Appeals' Opinion speaks for itself. 11

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Ercegovich v. Goodyear Tire & Rubber Co.,
154 F.3d 344 (6th Cir. 1988) 7, 10-12

Holifield v. Reno,
115 F.3d 1555 (11th Cir. 1997) 10

Leffel v. Valley Financial Services,
113 F.3d 787 (7th Cir.) *cert. denied*,
522 U.S. 968 (1997) 8

Marzano v. Computer Science Corp.,
91 F.3d 497 (3d Cir. 1996) 7

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 1, 4-6

Oxman v. WLS-TV,
846 F.2d 448 (7th Cir. 1988) 7, 8

Pierce v. Commonwealth Life Ins. Co.,
40 F.3d 796 (6th Cir. 1994) 10

Pricewaterhouse v. Hopkins,
490 U.S. 228 (1989) 5

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133 (2000) 7

St. Mary's Honor Ctr. v. Hicks,
509 U.S. 502 (1993) 4, 5, 6

Thornbrough v. Columbus & Greenville R.R. Co.,
760 F.2d 633 (5th Cir. 1985) 8, 9

REPLY TO BRIEF IN OPPOSITION

Petitioner Philip Berquist respectfully submits the following Reply to Respondent's Brief in Opposition to Berquist's Petition for Certiorari.

I. Berquist Has Not Waived any Issue Concerning his Termination or Reduction in Force grounds.

Respondent's echo (p. 17) of the Fifth Circuit's assertion that Berquist did "not appeal the district court's holding on his claim of reduction in force based on unlawful age discrimination" (Opinion, p. 4, Appendix, p. 5a-6a) is contrary to the record, which reflects that Berquist appealed the District Court's entry of summary judgment against him.

More importantly, this statement by the court below reflects its literalistic and formulaic application of the *prima facie* standard. Rather than analyzing the evidence put forth by the parties below and determining whether Berquist could show that his employment ended because of his age, the court below literalistically analyzed the *prima facie* case and went so far so far as to break Berquist's lawsuit into two supposedly distinct claims (RIF and termination).

Furthermore, the "waiver" argument illustrates the other central problem Petitioner presents to this Court: that the Court of Appeals required Berquist in his *prima facie* case (as opposed to the final stage of the *McDonnell Douglas* analysis) to refute the Bank's purported legitimate non-discriminatory reasons for his discharge – whether it be called a RIF, a lay off, a

closing of one office and transfer of job functions to another office, or a termination.

In this case, Berquist sued Washington Mutual claiming that his termination was based on age. R. 162, 171 (Third Amended Complaint). Berquist did not allege two claims -- one a termination based on a RIF, and the other a wrongful termination claim; rather, his complaint states one claim of age discrimination. While he noted that "Defendant classified Plaintiff's termination of employment as a lay off," R. 170, his claim was that age was a causal factor in his termination in violation of the ADEA. R. 171-72. Moreover, Berquist disagreed that he was genuinely laid off. *See* Appellant's Brief, p.41-42.

In response to a claim of age discrimination, it is the Defendant's burden to articulate a legitimate non-discriminatory reason for its actions. Thus, although it was Washington Mutual's burden to state a legitimate reason for Berquist's termination, the District Court stated that "[i]t is unclear whether *Berquist* is claiming that WAMU discriminated against him by eliminating his position (a wrongful termination claim) or by failing to find another position for him (a reduction in force claim)." R. 1039 (emphasis added). Accordingly, the district court analyzed the termination decision under both theories and concluded (incorrectly) that the Bank was entitled to summary judgment under either theory because Berquist could not show he was qualified for his current job or another position. R. 1039 - 1042.

Berquist appealed. R. 1065. Nowhere does Berquist's notice of appeal state that it was only an

appeal of only part of the District Court's decision. R. 1065. Because the District Court's award of summary judgment to the Bank was based on its erroneous conclusion that Berquist could not show he was qualified, the parties' briefs naturally focused on that issue. However, in his brief, Berquist challenged his termination and argued that his evidence showed that the Bank's purported rationale -- that he was laid off in a reorganization -- was false. Appellant's Brief at 41. Moreover, in support of the fourth prong of the *prima facie* case, Berquist stated that he was let go in favor of younger employees who were retained and ultimately transferred. Appellant's Brief at 38-39. Thus, he did not "waive" any argument that his termination occurred in the context of a reduction in force. The fact that Berquist complained about his "termination"[1] to the Court of Appeals cannot be construed as failure to challenge his termination under a RIF theory -- to the contrary, Berquist was challenging his termination, whatever the Bank's rationale for it.

---

[1] *See, e.g.*, Appellant's Brief, p. 41; Reply Brief, p. 3 (distinguishing a termination case from a hiring or promotion case). Moreover, Berquist argued to the court below that the Bank's offer to relocate the two younger employees while refusing relocation to Berquist was evidence of age discrimination. *See* Reply Brief, p. 14.

II. Respondent's Argument Confirms the Confusion Among the Courts as to the Purpose and Requirements of the *Prima Facie* case, particularly where a Plaintiff does not show replacement.

The Fifth Circuit's holding makes clear that Berquist was required to demonstrate, at the *prima facie* stage, a degree of proof high enough to support a judgment in his favor;

> Based on this evidence, a reasonable trier of fact could not determine that Washington Mutual otherwise discharged Berquist based on his age.

Appendix 23a. Strangely, rather than point out that this is an isolated opinion, Respondent refers to other Courts that are in agreement with the Fifth Circuit's ruling in this regard. This argument only confirms that significant confusion exists as to the plaintiff's burden at the *prima facie* stage.

The confusion likely stems, as this Court stated in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515, because of the tendency of courts to "dissect the sentences of the United States Reports as though they were the United States Code." *Id. Hicks*, however, explained that despite any possible confusion caused by dicta in the Court's previous opinions,

> Quite obviously, however, what is required to establish in the *McDonald Douglas prima facie* case is incontestably less than what a directed verdict demands.

Id. In fact, the majority in *Hicks* explained that nothing in the [illegible] allows courts to substitute the required finding that the employer's action was a product of unlawful discrimination for the "much different (and much lesser) finding that the employer's explanation of its action was not believable." *Id.* at 514-515. The court then noted that the "dissent's position amounts to precisely this, *unless* what is required to establish the *McDonald Douglas prima facie* case is a degree of proof so high that it would, in absence of rebuttal, require directed verdict for the plaintiff." *Id.*

Logically, of course, based upon this Court's prior holdings, it would make no sense to require that the plaintiff meet a level of proof sufficient to sustain a judgment at the *prima facie* stage. First, it would require the plaintiff to prove discrimination twice, once at the *prima facie* stage and secondly at the pretext stage (where the plaintiff again has to demonstrate that the adverse employment action is not because of the defendant's articulated reasons, but because of discrimination). Second, if such a high level of proof were required at the *prima facie* stage, it would sound strikingly similar to the level of proof required to constitute "direct evidence" under *Pricewaterhouse v. Hopkins*, 490 U.S. 228 (1989). In that case, it was noted that direct evidence "permitted a reasonable fact finder to conclude that 'absent further explanation, the employer's discriminatory motivation 'caused' the employment decision.'" *Id.* at 265 (O'Conner, J., concurring in judgment). Furthermore, it is hard to imagine this level of proof being required at the *prima facie* stage, when the *prima facie* case is defeated by the defendant's mere articulation of its reasons. *See*

Hicks, 509 U.S. at 510-511. This is particularly so since the defendant's articulation involves no credibility assessment whatsoever. *Id.* at 509.

The Court explained in *Hicks* that the inference created by the *prima facie* case is a mere legal presumption that its purpose is to require the defendants to articulate a legitimate explanation for its actions. *Id.* at 506-511. As this Court made clear in *Hicks*, it is not the probative force of the *prima facie* case that requires the defendant to articulate an explanation for its actions, but rather the legal "presumption" that is created under *McDonald Douglas*. *Id.* at 506-507.

Therefore, Respondent's assertions, which are based on the Fifth Circuit's opinion, demonstrates the rampant confusion among the lower courts on this issue. Thus, this case presents the Court with this question: What is the burden a plaintiff must meet in order for an employer to have to respond with a legitimate, non-discriminatory reason for its action, and how does this burden differ from the ultimate burden of proof of discrimination? This question is even more important at the summary judgment stage, where courts are evaluating the evidence produced by the parties in determining whether material questions of fact exist for trial. Put simply, as noted by Respondent, the Fifth Circuit (and others) requires the employee to prove, by a preponderance of evidence, a case of discrimination at the *prima facie* stage.

Moreover, if the Court of Appeals had in fact employed and correctly applied the standard put forth by Respondent (who claims that the Court of Appeals

was only ensuring that "any evidence creating an inference of discriminatory intent" will suffice, Brief in Opposition at 28), Petitioner would have no complaint on that point, for the outcome would have been different. Certainly the *prima facie* standard stated by the Court below has been used in other cases -- but the Court below did not simply require Berquist to show "any evidence creating an inference of discriminatory intent," rather, the Court below weighed the evidence and concluded that "a reasonable trier of facts could not determine that Washington Mutual otherwise discharged Berquist based on his age." Appendix 23a. Thus the Court below required Berquist to meet his ultimate burden at the *prima facie* stage -- and the Bank states that all the Circuits are in accord that this is an appropriate application of the *prima facie* burden.

Respondent's argument is irreconcilable with *Reeves* as well as with lower Court's decisions such as *Oxman*,[2] *Ercegovitch*,[3] and *Marzano*[4] – which recognize that treatment different from a similarly situated employee who is younger or of a different race or sex will suffice for the *prima facie* case. Berquist showed that when the Bank terminated his employment, he was let go while younger employees (who undisputedly had been performing the same job assignments as had Berquist) were retained and ultimately allowed to

---

[2] *Oxman v. WLS-TV*, 846 F.2d 448 (7th Cir. 1988).

[3] *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1988).

[4] *Marzano v. Computer Science Corp.*, 91 F.3d 497 (3d Cir. 1996).

transfer to other jobs. This evidence would have sufficed under the authorities that Respondent attempts to distinguish.

Moreover, in criticizing *Oxman v. WLS-TV*, 846 F.2d 448 (7th Cir. 1988), Respondent makes the unjustified conclusion that unless a showing of discriminatory intent is part of the *prima facie* case, a plaintiff could "prevail on a claim of intentional discrimination without ever adducing any evidence of [discriminatory intent]." Brief in Opposition, p. 21-22. It is also significant that the very case that Respondent states impliedly repudiated *Oxman* (Brief in Opposition, p. 22) actually cited *Oxman* favorably. *See Leffel v. Valley Financial Services*, 113 F.3d 787, 793 (7th Cir.) *cert. denied*, 522 U.S. 968 (1997) (citing *Oxman* and other authority for the proposition that "that in the context of a reduction-in-force suit, the plaintiff would have to establish as the final element of his prima *facie case* that employees not in the class of persons protected by the ADA were treated more favorably than he").

Finally, Respondent's reliance on *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 643-44 (5th Cir. 1985) (Brief in Opposition at 20, n. 7, 25) is similarly unhelpful to its position. The difficulty here is that the Court below did not utilize the *Thornbrough* approach. Had it looked to whether Berquist had produced "any type of circumstantial evidence that younger employees were more favorably treated than older employees," *id.*, the court below would have reached the opposite conclusion – that Berquist established a *prima facie* case because he was terminated while younger employees were retained

and ultimately afforded the opportunity to transfer to other positions. Rather than showing uniformity in the case law, the Bank has only shown inconsistency.

Because there is a vast variance among the courts below -- sometimes even within the same circuit -- as to the type of evidence sufficient to show a *prima facie* case, particularly where the plaintiff has not been replaced (such as frequently may be the case in a reduction in force) and the burden required to establish it, this Court should grant the petition for certiorari.

III. "Nearly Identical" is not the Same as Similar "in all Relevant Respects."

Respondent urges that the Fifth Circuit did not mean what it said and that its "nearly identical circumstances" standard is not materially different from a "similar in all relevant respects" standard. The opinion, however, speaks for itself and "nearly identical" is not the same as "similarly situated in all relevant respects." Respondent did not even address the issue of employing this heightened standard at the *prima facie* stage as opposed to the ultimate issue of discrimination.

Moreover, the opinion of the court below is internally inconsistent. While finding Berquist not similarly situated to Plaisance and Zapotek for purposes of his ADEA claim, the court below was quick to conclude that the Bank did rehire "other similarly situated employees willing to follow procedures," presumably referring to employees who had accepted the Bank's severance package (which required signing

a release). How such employees are "similarly situated" to Berquist while Plaisance and Zapotek were not is unclear.

Finally, Respondent's suggestion (p. 32) that Petitioner misled this Court as to the ruling in *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998) is false. While the court in *Ercegovich* did quote favorably another case using "nearly identical" in all "relevant aspects" language,[5] the emphasis of the court in *Ercegovitch* was that courts must consider all *relevant* circumstances in determining whether co-workers are sufficiently similar. Significantly, the court in *Ercegovitch* reversed the district court's determination that the plaintiff was not similarly situated to younger co-workers in different positions who, unlike the plaintiff, were allowed the opportunity to transfer instead of being terminated:

> We believe that when an employer makes selective offers of transfer following a reduction

---

[5] *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir.1994). In *Ercegovitch*, the court stated that in *Pierce*, the court explained that the plaintiff was simply "required to prove that all of the *relevant* aspects of his employment situation were 'nearly identical' to those of [the non-minority's] employment situation." *Id.* at 352 (citing *Pierce*, 40 F.3d at 802 (emphasis added)); *see also Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir.1997) (citing *Mitchell* in support of the proposition that "[t]o make a comparison of the plaintiff's treatment to that of non-minority employees, the plaintiff must show that he and the employees are similarly situated in all *relevant* respects" (emphasis added)).

> in force or a reorganization, differences in the job activities previously performed by transferred and non-transferred employees do not automatically constitute a meaningful distinction that explains the employer's differential treatment of the two employees. Common sense suggests that when an employer harboring age-discriminatory animus eliminates several employees' positions, its decision to transfer its younger workers to new positions while denying its older workers the same opportunity irrespective of past differences in their particular job functions may reflect proscribed age bias. Because the positions previously held by Ercegovich, Evert, and Cohn were all related human resources positions that were all eliminated pursuant to a general reorganization of the department of Human Resources Development at Goodyear's Akron location, we conclude that Ercegovich was sufficiently similarly-situated to Evert and Cohn to satisfy the fourth component of Ercegovich's *prima facie* case.

Ercegovich, 154 F.3d at 353. This reasoning is the opposite of that employed by the court below. Under *Ercegovitch*, Berquist is similarly situated to Plaisance and Zapotek.

IV. The Court of Appeals' Opinion speaks for itself.

Respondent argues that the Court of Appeals' opinion (which Berquist reads as suggesting that if only Berquist had "followed procedures" by signing a

release, he too, like Yancis, could have been rehired) is not reasonably susceptible to such a "nefarious" construction.[6] This is untrue. Respondent has offered no other plausible meaning of or explanation for the court's language. Further, Respondent has recognized the implication of the court's language, which is insidious. There is no basis in the law for any suggestion that an employee should waive and release his or her rights in order to persuade his employer to treat him more favorably.

Where a lower court "has so far departed from the accepted and usual course of judicial proceedings," an exercise of this Court's supervisory powers is appropriate. U. S. Supreme Court Rule 10(a). Here, whether deliberate or unintentional, the suggestion that if only an employee had "followed procedures" by signing a release, he could have been rehired, warrants correction by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

---

[6] Respondent also states that the court's statement is purely factual (as opposed to a legal holding) and thus suggests, without support, that it may be excused on those grounds.

Respectfully submitted,

AHMAD, ZAVITSANOS & ANAIPAKOS, P.C.

Joseph Y. Ahmad
Counsel of Record
Ahmad, Zavitsanos & Anaipakos, P.C.
3460 One Houston Center
1221 McKinney Street
Houston, Texas 77010-2009
Telephone: (713) 655-1101
Telecopier: (713) 655-0062

ATTORNEY FOR PETITIONER
PHILIP BERQUIST